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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 241.

GEORGE D. COLLINS, PLAINTIFF IN ERROR,

vs.

THOMAS F. O'NEIL, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JANUARY 7, 1908.

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a In the Supreme Court of the United States.

GEORGE D. COLLINS, Plaintiff in Error,
vs.
THOMAS F. O'NEIL, the Sheriff of the City and County of San Francisco; THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA, Defendants in Error.

Transcript of Record on Writ of Error.

1 In the Supreme Court of the State of California.

In the Matter of the Application of GEORGE D. COLLINS for the Writ of *Habeas Corpus.*

Petition for Writ of Habeas Corpus.

To the Honorable the Supreme Court of the State of California:

The petition of George D. Collins respectfully shows to your Honorable Court that he is now unlawfully and illegally imprisoned and restrained of his liberty by Thomas F. O'Neil Esq., the sheriff of the City and County of San Francisco, and in the County Jail of the said City and County of San Francisco. That the said imprisonment is unlawful and illegal in this: That the same is in violation of the Treaty of Extradition between the United States and Great Britain, and in violation of section 5275 of the Revised Statutes of the United States, and in violation of section one of the Fourteenth Amendment of the Constitution of the United States, and in violation of the Federal custody and jurisdiction vested in the United States over your petitioner by reason of and incidental to his extradition pursuant to said Treaty, and by virtue of the provisions of section 5275 of the Revised Statutes of the United States, and said imprisonment is also in violation of the right conferred upon your petitioner by said statute and by the law of nations to return to the country and asylum from which he was extradited by the United States.

That the following are the facts of the case, viz:

1. That on to wit: the 7th day of July A. D. 1905 and thence continuously unto the time of his extradition and surrender

2 hereinafter averred to wit: on the 22nd day of October A. D. 1905, your petitioner was a resident and inhabitant and domiciled in the City of Victoria, in the Province of British Columbia, Dominion of Canada and while he was such resident and inhabitant and so domiciled, he was on to wit: the said 22nd day of October A. D. 1905, upon the demand, requisition and application of the United States of America, and solely under and pursuant to and by virtue of the Treaty of Extradition, existing between the said United States and the United Kingdom of Great Britain and Ireland, surrendered, removed and extradited from the said City

of Victoria, to the United States and to San Francisco, in the State of California. That the said extradition was then and there granted, and permitted and ordered by Great Britain to the Government of the United States, exclusively upon a certain indictment prosecuted by the People of the State of California, theretofore to wit: on the 13th day of July A. D. 1905, found by the Grand Jury of said City and County of San Francisco, and on that date filed in the Superior Court of the State of California, in and for the City and County of San Francisco, and purporting to charge your petitioner with having on the 30th day of June A. D. 1905, committed the crime of perjury in the said City and County of San Francisco. That the said indictment is known and designated in said Superior Court by the number 16130, and is at issue and still pending in said Superior Court and awaiting a final trial therein, upon the plea of "not-guilty" interposed by your petitioner to the said charge therein in said indictment set forth.

2. That the said extradition was had and obtained by the United States and authorized, granted and permitted by Great Britain, through and by means of a warrant of surrender and of extradition issued by Great Britain to the United States, which warrant
3 of extradition, in terms specified that said extradition of your petitioner and his surrender to the United States are solely upon the said indictment and the charge of perjury therein contained, and that your petitioner "should not be tried nor triable for "or on account of any other offense than the one on which such "extradition has been granted to wit: the said crime of perjury "charged in the said indictment, until after the final conclusion of "his trial for the said offense and until his final discharge from "custody or imprisonment for or on account of such offense and "thereafter until he has had a reasonable opportunity of returning "to the country from which he was taken on said extradition." That the United States thereupon accepted and received the said surrender and extradition of your petitioner upon said terms and conditions, and your petitioner was by the Government of Great Britain on said terms and conditions and by virtue of the said Treaty of Extradition, delivered over and surrendered at the said City of Victoria, into the federal custody of the United States and your petitioner's custody was then and there taken and accepted by the United States, in trust, and for the sole and exclusive purpose of bringing your petitioner to final trial before the said Superior Court upon the said criminal charge set forth in said indictment and upon the said indictment, and on no other criminal charge, and to the exclusion of every other indictment and whether the offense be prior or subsequent to the said extradition and to detain him in the said federal custody of the United States pursuant to the law of nations and the provisions of section 5275 of the Revised Statutes of the United States, and to maintain said federal jurisdiction, custody and control over him, until the final termination of said extradition case and until the final trial and disposition of said criminal charge and of the said indictment numbered
4 16130, to the exclusion of every other charge or charges; or in the language of section 5275 of the Revised Statutes of

the United States, "until the final conclusion of his trial for the "crime or offense specified in the warrant of extradition, and until "his final discharge from custody or imprisonment for or on account "of such crime or offense, and for a reasonable time thereafter," with the international right to your petitioner to return unmolested to the said country of asylum, immediately upon the final conclusion of his trial upon said extradition charge and on his final discharge from custody or imprisonment upon said charge, and without right on the part of said State of California to arrest or detain or prosecute him upon any other charge or charges, whether prior or subsequent to the said extradition, *pending the final determination of the charge upon which the said extradition was granted and obtained.* That all said terms and conditions constitute and are a part of the stipulation and agreement between Great Britain and the United States upon which your petitioner was extradited and removed as aforesaid from the said country of asylum, upon said criminal charge.

3. That thereupon and pursuant to the said extradition, your petitioner was by the United States brought before the said Superior Court for trial, upon said indictment and on said extradition charge, and was by the United States and while in the said federal custody and control of the United States under and by virtue of said extradition, placed on his trial before the said Superior Court, upon the said indictment and charge on which said extradition was granted and obtained as is hereinbefore averred, and the result of said trial was that in the month of December A. D. 1905, the jury empanelled and sworn to try the case, and the said indictment, dis-
agreed and thereupon on that date were by said Superior
5 Court ordered discharged and they were accordingly discharged and the said Superior Court then ordered that the said indictment and the charge therein set forth, be and the same thereby was set for a second trial and fixed a date subsequent for the purpose to wit: the 29th day of December A. D. 1905, and since then has repeatedly and very often and on numerous occasions, to wit: more than twenty times and each time on mere application and motion of the prosecution and without cause and against the objection and exception of your petitioner, arbitrarily postponed the second or further trial of said indictment and of said extradition charge, until now the same is by the order of said Superior Court, set for a second and further trial on December 24th, 1906, with no prospect of a trial being permitted by said Superior Court, even then, and with no *bona fide* purpose on the part of the State of California, of proceeding with the second or further trial of said case, at that or any other time. That your petitioner avers upon his information and belief that the further prosecution of the said extradition case has been abandoned by the said State of California, and that in consequence, the said case will never be placed upon trial nor brought to trial. That your petitioner has never been discharged nor released in said extradition case nor on said extradition charge and has never had a reasonable nor any opportunity to return to the said country from which he was extradited. That the said

State of California refuses to give or afford him an opportunity to return to the said country from which he was extradited, and detains him against his will and protest in said unlawful imprisonment, and refuses to discharge or dismiss him or to dismiss the accusation in said extradition case; but does not imprison him therein, nor hold him in custody upon said extradition charge, nor in
6 relation thereto, nor on account thereof.

I. That the said indictment and the said charge of perjury therein set forth, and the said extradition case, are still pending and undetermined and awaiting trial in the said Superior Court and have not been finally or at all determined or disposed of, either in said Superior Court or elsewhere, notwithstanding that your petitioner has at all times been ready and willing and has every time and at every opportunity demanded of the State of California and of said Superior Court and insisted that said indictment and the charge therein set forth and the said extradition case, be brought to trial and be finally determined and disposed of, as was and is his right under the law governing the said extradition, and as is required by the international obligation and undertaking of the United States, in consequence and by virtue of said extradition. That the said Superior Court and the said State fo California have at all times persistently and arbitrarily overruled and refused the said demand of your petitioner, and have on the contrary and against his objection and protest, and subsequently to said disagreement of said jury in the said extradition case, and without the consent of the United States or of Great Britain and despite the objection and protest of your petitioner, arrested him upon another and entirely different charge and upon another and entirely different indictment; and against your petitioner's protest and objection, forcibly seized and removed him from the said custody and control of the United States without the consent of the United States and against your petitioner's will and protest forcibly arrested him upon said subsequent charge and forcibly removed him into the said custody and possession of the said State of California; and the said State of California has continuously ever since and does now forcibly and against his will and protest and without the consent or ac-
7 quiescence or sanction of the United States or Great Britain, hold and detain him in its said custody and imprisons him upon the said subsequent charge and to the exclusion of said extradition and has against his protest and objection and without the consent of the United States or of Great Britain, and superseding said extradition case has proceeded with the trial and prosecution to judgment and sentence *during the pendency of said extradition case*, of such other and different charge and upon said other and different indictment, and in respect to which no extradition has ever been sought or granted; that said last mentioned charge and indictment were brought against your petitioner by said State of California since the said first trial of the said extradition case, and in which second and subsequent indictment your petitioner is accused of having committed another and different offense of perjury, than the one specified as aforesaid in said extradition warrant, and charged and set

forth in the said indictment upon which said extradition was granted and obtained, and which subsequent offense was committed if at all, prior to the said extradition, and is not the offense specified in said extradition proceedings, nor in said extradition warrant, nor the offense nor charge for which nor upon which the said or any extradition was granted or obtained but is an entirely different offense and an entirely different charge, and on which there has been no extradition whatever. That the following are the facts concerning the said subsequent charge, viz:

II.

That on the 29th day of December A. D. 1905, and after the said disagreement and discharge of said trial jury empanelled and sworn as aforesaid for the trial of said extradition case, and while your petitioner was in the said federal custody and control of the
8 United States, upon said extradition charge, and awaiting the further trial of that charge, the said State of California instead of proceeding to and with the second or further or the final trial of said extradition case, caused to be found and there was on said date and at the instance of said State of California, found and filed by the Grand Jury of the said City and County of San Francisco in the Superior Court of the said State of California, in and for the said City and County of San Francisco, an indictment purporting to charge and accuse your petitioner with having committed another and different offense of perjury than the one specified in the said extradition warrant and in said extradition proceedings; and the offense so charged is not the same but is an entirely different offense of perjury from that referred to and specified in said first indictment and in said extradition case and is not the offense for which nor upon which the said or any extradition was had, obtained or granted but is an offense alleged and charged in said second indictment to have been committed by your petitioner on the 12th day of December A. D. 1905, in giving his testimony while a witness on his own behalf on the said trial of said first charge and said first indictment, to wit: the indictment and charge upon which the said extradition was granted and obtained as is hereinbefore alleged, in testifying on said trial that the statement charged in said first indictment and therein assigned as perjury was and is the truth and nothing but the truth; and this petitioner doth now and on his oath re-affirm and assert the truth of the said statement in said first indictment assigned as perjury; and your petitioner saith that the offense charged in said second indictment was committed if at all prior to the said "extradition" for the following reasons, viz:
9 1. Because a verdict acquitting your petitioner on said first indictment, on the ground that he testified truthfully in making the said statement assigned as perjury in said second indictment, would be *res adjudicata* and bar said second prosecution. (*Cooper vs. Com.* 51 South Western Rep. 789; *U. S. vs. Butler*, 38 Fed. Rep. 498). 2. In the next place, within the meaning of the law of nations, the *extradition* is an entirety and does not end nor terminate until the final conclusion and the final determination and

disposition of the charge and indictment upon which the extradition was granted and obtained, and therefore any offense committed previously to that time, is necessarily an offense committed prior to the "extradition," and prior to the termination of the extradition case within the meaning of the law. 3. Perjury when repeated *as to the same facts* is necessarily a continuing offense and cannot be split up into separate and different crimes, each the subject of an independent prosecution. (*Ex Parte Snow* 120 U. S. 274; *Com. vs. Robinson*, 136 Mass. 259; *People vs. Defore*, 100 Cal.). A person who in one case makes one hundred statements under oath, in a judicial proceeding, each wilfully false and material, cannot be subjected to one hundred different prosecutions for perjury, and the same principle applies to a repetition of the same statement in different cases. The sovereignty of the State is violated but once, and only one prosecution is permissible; if more than one there may be ten or twenty and the accused sentenced to fourteen years on each with an aggregate of ten times or twenty times fourteen, which is ridiculous. 4. The extradition charge absorbs the offense and the accused has the right, given him by international law to claim the benefit and protection of the extradition proceedings and in that behalf to insist on the extradition charge being *first finally disposed of*, in performance of the international obligation imposed upon the United States by reason of the said extradition, and, to protect his right to return to the country of asylum from which he was removed, before any further or other prosecution is initiated or maintained against him, should he be acquitted and discharged in the extradition case. Clearly if acquitted on the extradition charge, on the ground that he testified truthfully in making the statement assigned as perjury in said first indictment, it must be *res adjudicata* of an essential element and issue involved in the second indictment and on the merits the latter could not be sustained. (*Cooper vs. Com.* 51 S. W. Rep. 789; U. S. *vs.* Butler, 38 Fed. Rep. 498). It follows that to prosecute the petitioner on the second charge of perjury, as to which there has been no extradition, is to defraud him of the rights vested in him by the law governing his extradition, and is to supersede the extradition process and to hinder and delay the same and render it nugatory and abortive.

III.

That the said second indictment is numbered and officially designated 16415 in the said Superior Court and was by the said State of California prosecuted to trial and judgment against your petitioner, despite his objection and protest made to and before said Superior Court and expressly based upon the following grounds stated and presented by your petitioner to said Superior Court, to wit: that said arrest, prosecution, trial and judgment on said indictment numbered 16415, are in violation and in contravention of said Extradition Treaty between Great Britain and the United States, and of section 5275 of the Revised Statutes of the United States, and of the law of nations, and of Section one of the Fourteenth Amendment of the Constitution of the United States in operating to deprive your

petitioner of his liberty without due process of law and de-
11 nying to him the equal protection of the law, and in violation
and in contravention of the federal custody and control vested by international law and by said Treaty and by said statute, in the United States by virtue of said extradition and for the purpose of fulfilling and performing the international obligations imposed on the United States by reason of said extradition, and resulting therefrom. That the said objection and protest, expressly made to said Superior Court upon said grounds, were by your petitioner presented to and urged upon and argued before said Superior Court at the very inception of said second prosecution and upon the arraignment on said second indictment, and thence continually thereafter, at every step in the proceedings in the course of said second prosecution and to the arrest and arraignment and trial and conviction, and judgment therein, and against the sentence and imprisonment of your petitioner in the matter of said second prosecution, and each time on proof therein, to said Superior Court of all the facts in this petition averred in respect to said extradition case and on proof to said Superior Court of said terms and conditions on which said extradition was granted and obtained, and of the actual pendency in said Superior Court, of the said extradition case, and of the actual pendency in said Superior Court of said extradition charge awaiting therein a further and a final trial, and on proof to said Superior Court at each step and proceeding in said second prosecution, of the fact that said case, indictment and charge upon which your petitioner was extradited as averred in this petition, to wit: said case numbered 16130 has never been finally nor at all determined or disposed of in said Superior Court or elsewhere, and is still pending and awaiting trial therein. That at all times the said Superior Court
12 disregarded said proofs and peremptorily and arbitrarily overruled each and all of said objections and protests on the part of your petitioner and despite the same, convicted him upon said second indictment to wit: the indictment in said case numbered 16415, and on said second and subsequent charge of perjury, and adjudged on the 10th day of March A. D. 1906, that your petitioner be punished on said conviction by imprisonment in the state prison at San Quentin in said State of California for the term of fourteen years and in said judgment ordered that your petitioner be imprisoned by the said sheriff of said City and County of San Francisco, in the said County Jail thereof, pending the arrival of the time when said judgment can be executed in course of law. That the said sheriff doth now accordingly imprison your petitioner and deprives him of his liberty in said County Jail, exclusively and solely pursuant to said judgment, and the said order of imprisonment and for no other cause, and upon no other ground, and by virtue of no other authority.

That your petitioner is not imprisoned nor held in custody nor deprived of his liberty, for any cause nor upon any charge other than the said void judgment and said void order of imprisonment and the proceedings thereon. That the said sheriff does not hold nor claim nor pretend to hold in custody nor imprison your peti-

tioner nor restrain him of his liberty, upon the said extradition charge nor upon said extradition nor in said extradition case, nor in respect thereto, nor upon the indictment nor upon the said charge on which said extradition was granted and obtained, nor upon any proceeding, or writ, warrant, order or process or authority in said extradition case nor in any wise relating thereto. That the said sheriff has no other order warrant or process or authority for the said imprisonment of your petitioner than the said void
13 judgment and the said void order of imprisonment incidental to said void judgment. That by reason of the matters hereinbefore pleaded and by reason of the *pendency* of said extradition case, the said Superior Court had no jurisdiction over said second prosecution, nor to render said judgment, nor to convict said petitioner therein, nor to imprison him nor to order his said imprisonment in said cause numbered 16415, or at all.

That the said sheriff and said State of California, do now deprive your petitioner of his liberty by said imprisonment, in violation and in contravention of the Treaty of Extradition between the United States and Great Britain, and in violation of the law of nations and in violation of section 5275 of the Revised Statutes of the United States and in violation and contravention of the federal custody and jurisdiction and control over your petitioner, vested in the United States and existing *pending* and until the final trial and determination and the final disposition of said extradition case and of the said extradition charge and for a reasonable time thereafter, by virtue of the law of nations and of said statute; and also in violation of section one of the Fourteenth Amendment of the Constitution of the United States, in depriving your petitioner of his liberty without due process of law and in denying to him, the equal protection of the law.

That the said conviction and the said judgment in said Superior Court and the prosecution resulting in the said conviction and the said judgment, and said order of imprisonment are beyond and in excess of the jurisdiction of said Superior Court, and in violation and in contravention of the Treaty of Extradition between the United States and Great Britain, and in violation of the law
14 of nations and in violation of section 5275 of the Revised Statutes of the United States and of the federal custody and jurisdiction and control over your petitioner, vested in the United States and existing pending and until the final determination and disposition of said extradition case and said extradition charge and for a reasonable time thereafter, by virtue of the law of nations and of said statute; and also in violation of section one of the Fourteenth Amendment of the Constitution of the United States in depriving your petitioner of his liberty without due process of law and in denying him the equal protection of the law; and for all these reasons are absolutely null and void and said imprisonment unlawful.

Wherefore your petitioner prays that he be granted by your Honorable Court, the Writ of *Habeas Corpus*, directed to the said Thomas F. O'Neil, the sheriff of said City and County of San Francisco, and returnable before your Honorable Court at a time and place designated. That upon the return to the Writ and after

hearing the case, it be adjudged by your Honorable Court that the said conviction, judgment and sentence and order of imprisonment in said cause and on said indictment No. 16415, and all the proceedings and process and orders of whatever character or description in said cause and on said second indictment or in respect to the charge or accusation therein set forth, and the said imprisonment, are in violation and in contravention of the Treaty of Extradition between the United States and Great Britain and in violation of the law of nations, and in violation of Section 5275 of the Revised Statutes of the United States and in violation of the Federal custody, jurisdiction and control over your petitioner, vested in the United States by international law, and by section 5275 of the Revised Statutes of the United States and in violation of section one of the Fourteenth Amendment of the Constitution of the United
15 States, and for these reasons that the said imprisonment is illegal and unlawful and the said proceedings, prosecution, conviction, judgment, sentence and order of imprisonment are absolutely null and void and beyond the power, authority and jurisdiction of the said Superior Court. That your petitioner be by your Honorable Court adjudged entitled to his liberty and ordered discharged and released from the said imprisonment. That your petitioner be admitted to bail pending the final determination of said Writ of *Habeas Corpus*, and as provided for in section 1475 of the Penal Code of said State of California, as amended March 20, 1905.

And your petitioner will ever pray etc.

(Signed) GEORGE D. COLLINS, *Petitioner.*

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

George D. Collins being duly sworn deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own
16 knowledge except as to the matters therein stated upon his information or belief; that as to those matters he believes it to be true.

(Signed) GEORGE D. COLLINS.

Subscribed and sworn to before me, this 10th day of December A. D. 1906.

[NOTARIAL SEAL.] JULIUS CALMANN,
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed: Filed Dec. 10, 1906. Frank C. Jordan, Clerk. By Dryden, Deputy.

Also endorsed: "By the Court:—

"On reading and filing the within petition it is ordered that the "Writ of *Habeas Corpus* issue as therein prayed, returnable before

" the Supreme Court *in banc* at San Francisco on Thursday, Dec.
" 20, 1906 at ten o'clock A. M.
" Decr. 17, 1906.
(Signed) BEATTY, *C. J.*"

Endorsed: Filed Dec. 17, 1906. Frank C. Jordan, Clerk.

17 In the Supreme Court of the State of California.

In re Application of GEORGE D. COLLINS for Writ of *Habeas Corpus.*

Now comes Thomas F. O'Neil, sheriff of the City and County of San Francisco, and makes the following return to the Writ of *Habeas Corpus* issued in the above entitled matter. The said sheriff has the said George D. Collins in his custody and under and pursuant to the annexed writ served on the 18th day of December, 1906, produces the said George D. Collins to the above entitled Court. The said sheriff holds the said George D. Collins under and by virtue of the following process, orders and warrants to wit:

1. Commitment issued out of the Superior Court of the State of California in and for the City and County of San Francisco, Department No. 11 thereof, Hon. Albert G. Burnett, Judge, certified copy of which is hereunto annexed, marked "A" and made a part hereof.

2. Certificate of Probable cause issued out of the said Superior Court, certified copy of which is hereunto annexed, marked "B" and made a part hereof.

3. Bench warrant issued out of the said Superior Court, copy of which is hereunto annexed, marked "C" and made a part hereof.

4. Warrant of Surrender and extradition issued by the Government of Great Britain to the United States. The said warrant of extradition has been destroyed as the said sheriff is informed and believes and therefore avers that the same was granted by Great Britain upon proceedings instituted for the extradition of the said George D. Collins under and by virtue of an indictment num-

18 bered 16130 returned by the Grand Jury of the City and County of San Francisco on the 9th day of July, 1905, a copy of which indictment is hereunto annexed, marked "D" and made a part hereof.

Under the said Warrant of Extradition the said George D. Collins at Victoria in the Dominion of Canada was delivered unto Thomas B. Gibson a regular agent for that purpose of the State of California and by said Gibson brought to the City and County of San Francisco, and by said Gibson then delivered unto the custody of the then sheriff of the City and County of San Francisco who subsequently delivered the custody of the said petitioner under said warrant of extradition to this sheriff. That the commitment and judgment hereinbefore referred to, the said Certificate of Probable Cause and the said Bench Warrant were all issued by virtue of an indictment returned by the Grand Jury of the City and County of San Francisco, on the 28th day of December, 1905, numbered

16415, a copy of which indictment is hereunto annexed, marked "E" and made a part hereof. That the said petitioner has perfected an appeal from said judgment of conviction under indictment numbered 16415 and the said appeal is now pending in the District Court of Appeals, First Appellate District, State of California, transcript therein having been printed, served and filed; that said appeal will probably be upon the calendar of said Court for argument after January 21, 1907.

As a further return and for answer to the petition herein the said Thomas F. O'Neil as such sheriff alleges and denies as follows, to wit:

He denies that the imprisonment of said George D. Collins is unlawful or illegal or that the same is in violation of the Treaty of Extradition between the United States and Great Britain or
19 in violation of Section 5275 of the Revised Statutes of the United States or in violation of Section One of the Fourteenth Amendment of the Constitution of the United States or in violation of the federal custody or jurisdiction vested in the United States over petitioner by reason of or incidental to his extradition pursuant to said Treaty or otherwise or by virtue of the provisions of Section 5275 or any of them of the Revised Statutes of the United States, or that said imprisonment is in violation of the right conferred upon petitioner by said or any statute or by the law of nations to return to the country of asylum from which he was extradited by the United States or otherwise.

Denies that the said warrant of extradition referred to in said petition and in this return, recited that "the petitioner should not be "tried nor triable for or on account of any other offense than the "one on which said extradition has been granted to wit: the said "crime of perjury charged in said indictment until after the final "conclusion of his trial for the said offense and until his final dis-"charge from custody or imprisonment for or on account of such "offense or thereafter until he has had a reasonable opportunity to "return from the country from which he was taken on said extradi-"tion." Denies that the United States accepted or received the surrender or extradition of the petitioner only upon said terms and conditions. That said petitioner from and after the 7th day of July, 1905, was a fugitive from justice from the State of California and said petitioner was not a resident or inhabitant or domiciled in the City of Victoria in the Province of British Columbia, on the 7th day of July, 1905, or thereafter. Denies that the petitioner's custody was taken or accepted by the United States in trust for the sole or exclusive purpose of bringing your petitioner to final trial
20 before the said Superior Court on the criminal charge set forth in the indictment upon which he was extradited and upon no other criminal charge; or to the exclusion of every other indictment whether the offense be prior or subsequent to said extradition. Denies that said petitioner was surrendered and extradited upon the condition that he should not be tried for any subsequent offense pending the final determination of the charge upon which said extradition was granted or obtained.

Alleges that after the mis trial upon said indictment upon which

the petitioner was extradited and good cause was always shown by the District Attorney and determined by the Court to exist for the postponement of the second or further trial of the said indictment and of said extradition charge and that on the 24th day of December, 1906, the petitioner consented in Open Court that said cause might be continued until January 1907, for the purpose of having said court make an order restoring the records in said cause which were destroyed by fire on or about the 18th day of April, 1906, and that no prosecution can be had in said cause for the second or further trial until such restoration of records is had.

Denies that the petitioner was ever forcibly seized or removed from the custody or control of the United States without the consent of the United States or that he is now or has been detained in custody without the consent or acquiescence or sanction of the United States or of Great Britain.

Denies that the offense upon which said petitioner was convicted and sentenced was an offense committed prior to said extradition and that said offense was committed on the 12th day of December, 1905, long after said petitioner was extradited as hereinbefore referred to.

21 Denies that the arrest, prosecution, trial or judgment of the petitioner on the said indictment numbered 16415 were or are in violation or contravention of any extradition treaty between Great Britain or the United States or of Section 5275 of the Revised Statutes of the United States or any other statute of the United States or of the law of nations or of Section One of the Fourteenth Amendment of the Constitution of the United States in operating to deprive the petitioner of his liberty without due process of law or in denying to him the equal protection of the law or in violation or in contravention of any federal custody or control vested by international law or by any Treaty or by any statute. Denies that the sheriff imprisons the petitioner or deprives him of his liberty in the County Jail exclusively or solely pursuant to the judgment of conviction hereinbefore referred to and the order of imprisonment thereon and for no other cause or upon no other ground or by virtue of no other authority.

Denies that the sheriff does not hold the petitioner upon said extradition charge or upon any proceedings or writ, return, order or process or authority in said extradition case or in anywise relating thereto.

Denies that the sheriff has no other order, return or process or authority for the said imprisonment of the petitioner than the said judgment hereinbefore referred to and order of imprisonment incidental to said judgment.

Dated December 27th, 1906.

(Signed) THOS. F. O'NEIL, *Sheriff.*
(Signed) W. H. LANGDON,
District Attorney.
WM. HOFF COOK,
Assistant District Attorney.
Attorneys for Respondent.

22 "A."

Commitment.

In the Superior Court, City and County of San Francisco, State of California.

Department No. 11.

SATURDAY, *March 10th*, 1906.

Present: Hon. Albert G. Burnett, Judge.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
GEORGE D. COLLINS.

Convicted of felony, to wit: perjury.

The District Attorney with the defendant and his counsel Messrs. H. C. McPike and Louis Boardman came into court. The defendant was duly informed by the Court of the indictment duly presented and filed on the 29th day of December, 1905, by the Grand Jury of the City and County of San Francisco, charging said defendant with the crime of felony, to wit: perjury, of his arraignment on the 20th day of January, 1906, and plea of "Not Guilty" as charged in said indictment on the 27th day of January, 1906, of his trial and the verdict of the jury on the 27th day of February, 1906. We the jury find George D. Collins the defendant in the above entitled case, guilty as charged in the indictment herein. The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant moved the Court for a new trial, which motion was by the Court denied, to which ruling defendant excepts.

Defendant thereupon moved the Court in arrest of judgment, which motion was by the Court denied, to which ruling defendant excepts, and no sufficient cause being shown or appearing to the Court, thereupon the Court renders its judgment: That whereas the said George D. Collins having been duly convicted by this Court of the crime of felony, to wit: perjury, it is therefore ordered,

23 adjudged and decreed that the said George D. Collins be punished by imprisonment in the State Prison of the State of California at San Quentin, California, for the term of fourteen (14) years. The defendant was then remanded to the custody of the sheriff of the said City and County to be by him delivered into the custody of the proper officers of said State Prison at San Quentin, California.

Office of the County Clerk of the City and County of San Francisco.

I, H. I. Mulcrevy, County Clerk, and *ex-officio* clerk of the said Superior Court thereof do hereby certify the foregoing to be a true and correct copy of the judgment entered in the minutes of said Court in and for the City and County of San Francisco, State of California, in the above entitled cause as appears of record in my office.

This my hand and the seal of said Superior Court this 24th day of March A. D. 1906.

[SEAL.] H. I. MULCREVY, *Clerk.*
By LAWRENCE BUCKLEY,
Deputy Clerk.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, State of California and *ex-officio* clerk of the Superior Court in and for said City and County hereby certify the foregoing to be a full, true and correct copy of the original judgment and sentence in the above entitled cause, filed in my office on the 27th day of February A. D. 1906.

Attest my hand and seal of said Court this 24th day of March, 1906.

[SEAL.] H. I. MULCREVY, *Clerk.*
By LAWRENCE BUCKLEY,
Deputy Clerk.

24 "B."

In the Superior Court in and for the City and County of San Francisco, State of California.

No. 16415.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
GEORGE D. COLLINS, Defendant.

Certificate of Probable Cause.

In the above entitled action George D. Collins, the defendant therein, having duly taken an appeal to the District Court of Appeal of the State of California in and for the First Appellate District from the final judgment of conviction heretofore rendered in said action by the Superior Court in and for the City and County of San Francisco, State of California.

Now therefore, good cause appearing, this is to certify that in my opinion there is probable cause for the said appeal; let a copy hereof be served upon the sheriff of the City and County of San Francisco as provided in section 1244 of the Penal Code.

In witness whereof, I have hereunto set my hand this 10th day of March A. D. 1906.

ALBERT G. BURNETT,
Judge of the Superior Court.

I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, State of California and *ex-officio* clerk of the Superior Court in and for said City and County, hereby certify the
25 foregoing to be a full, true and correct copy of the original Certificate of Probable Cause in the above entitled cause, filed in my office on the 10th day of March A. D. 1906.

Attest my hand and seal of said Court this 10th day of March, 1906.

[SEAL.]

H. I. MULCREVY, *Clerk.*
By LAWRENCE BUCKLEY,
Deputy Clerk.

26 "C."

Bench Warrant.

In the Superior Court, City and County of San Francisco, State of California.

Department No. 11.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

The People of the State of California to any sheriff, constable, marshal or policeman in this State:

An indictment having been presented and filed by the Grand Jury of the City and County of San Francisco, on the 29th day of December, A. D. 1905, in the Superior Court of the City and County of San Francisco, charging George D. Collins with the crime of felony, to wit: perjury, you are therefore commanded forthwith to arrest the above named George D. Collins and bring him before that court to answer the charge or if the Court having adjourned for the term, that you deliver him into the custody of the sheriff of the City and County of San Francisco or if he require it that you take him before any magistrate in that county or in any county in which you arrested him, that he may give bail to answer to the said charge.

Given under my hand with the seal of the Court affixed this the 29th day of December, A. D. 1905, by order of the Court.

JOHN J. GREIF,
County Clerk of the City and County of San Francisco, and ex-Officio Clerk of said Court,
By J. B. MARTIN, *Deputy Clerk.*

Endorsed as follows:

The defendant George D. Collins to be admitted to bail in the sum of Fifteen thousand dollars.

JOHN J. GREIF, *Clerk,*
By J. B. MARTIN,
Deputy Clerk.

Also endorsed:

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, the undersigned deputy sheriff, do hereby make this my return to this warrant and do hereby certify I have executed and served this warrant by arresting the within named defendant George D. Collins this 29th day of December A. D. 1905 and delivered him into the custody of the sheriff of the City and County of San Francisco, State of California.

MARTIN L. WELCH,
Deputy Sheriff.

27 "D."

In the Superior Court of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
GEORGE D. COLLINS.

The 13th day of July A. D. Nineteen hundred and five George D. Collins is accused by the Grand Jury of the said City and County of San Francisco by this indictment of the crime of felony, to wit: perjury committed as follows: On the 30th day of June A. D. Nineteen hundred and five at the said City and County of San Francisco, State of California, in the Superior Court of the State of California in and for the City and County of San Francisco, in Department No. 7 thereof there was pending for determination a certain action wherein Charlotta Eugenie Collins was plaintiff and this defendant, George D. Collins was defendant, said action being numbered 96355 in which action the said Charlotta Eugenie Collins as plaintiff sought to obtain against the said George D. Collins as defendant, a judgment for maintenance, support and alimony for herself and the child of herself and the said George D. Collins, defendant, said Court as aforesaid having competent jurisdiction to decide and determine said action according to the laws of the State of California was then and there fully empowered to administer the law in said action; that it then and there became material to know in said action whether or not the said Charlotta Eugenie Collins and the said George D. Collins had intermarried on the 15th day of May Eighteen hundred and eighty-nine and whether or not the said Charlotta Eugenie Collins and the said George D. Collins were husband and wife ever since the last mentioned date and were husband and wife at the time of filing the said action and during all of the
28 time of the pendency of said action; and that then and there on the said 30th day of June, Nineteen hundred and five, said action being then and there pending and undetermined in the said Court aforesaid, said defendant produced and filed in said Court and with the County Clerk of the said City and County of

San Francisco, his verified answer in said action which he had then and there, to wit: on the said 30th day of June, Nineteen hundred and five, subscribed and sworn to in said City and County before one A. J. Henry who was then and there a duly appointed, qualified and acting notary public of the State of California in and for the said City and County of San Francisco and who was then and there an officer authorized by law to administer oaths and to administer an oath in due form of law to the said George D. Collins and who did then and there administer at the said City and County of San Francisco and on the said 30th day of June Nineteen hundred and five an oath in due form of law to the said George D. Collins that he the said George D. Collins would then and there testify, declare, depose and certify truly before the said A. J. Henry, notary public as aforesaid in the matter of the verification of said answer filed as aforesaid in said action; and the said George D. Collins being so sworn as aforesaid did then and there take and make oath that he would testify, declare, depose and certify truly before the said A. J. Henry, notary public as aforesaid, in the matter of the verification of said answer filed in said action as aforesaid; and being so sworn and having taken said oath as aforesaid he, the said George D. Collins, did then and there to wit: at said City and County of San Francisco, on the 30th day of June Nineteen hundred and five and in the said answer filed as aforesaid in said action, wilfully, knowingly, corruptly, falsely, feloniously, swear, take oath, say
29 and give in evidence among other things in substance in said answer subscribed to as aforesaid as follows, namely, that the said Charlotta Eugenie Collins and the said George D. Collins did not intermarry on the 15th day of May Eighteen hundred and eighty-nine or at any other time and that the said Charlotta Eugenie Collins and the said George D. Collins were never at any time husband and wife, all of which was then and there false and untrue as he the said George D. Collins then and there well knew, whereas in truth and in fact as he the said George D. Collins then and there well knew, the said Charlotta Eugenie Collins and the said George D. Collins did intermarry on the 15th day of May Eighteen hundred and eighty-nine and were ever since said last mentioned day and at the time of filing said action and during the pendency thereof, husband and wife; that the said verified answer was on said 30th day of June Nineteen hundred and five and at said City and County of San Francisco, produced and filed in said Court and with the County Clerk of the said City and County of San Francisco in the said action by this defendant with the intent then and there on the part of this defendant that the said answer be uttered and published as true and with the intent then and there on the part of this defendant that the same be used in said action whereby he the said George D. Collins did then and there and thereby and on so testifying as aforesaid wilfully, unlawfully, feloniously, knowingly and contrary to his said oath and knowing his said testimony to be false, swear falsely and feloniously, commit wilful perjury contrary to the form, force and effect of the statute in such case made and

provided and against the peace and dignity of the People of the State of California.

LEWIS F. BYINGTON,
District Attorney.

Names of the witnesses examined before the Grand Jury
30 on finding the foregoing indictment:

William Newman, Florence Newman, A. J. Henry, Hiram Johnson.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, John J. Greif, County Clerk of the City and County of San Francisco, State of California and clerk of the Superior Court thereof, do hereby certify the within to be an original indictment duly presented by the Grand Jury of the City and County of San Francisco to the Superior Court of the said City and County of San Francisco in open court on the 13th day of July, Nineteen hundred and five and filed as a record of said Court.

In witness whereof, I have hereunto set my hand and the seal of said Court this 13th day of July A. D. 1905.

JOHN J. GREIF, *Clerk,*
By J. B. MARTIN, *Deputy.*

Endorsed: No. 16130. Superior Court. City and County of San Francisco, State of California. The People of the State of California *vs.* George D. Collins. Indictment for Felony to wit: Perjury. A true bill. T. B. Andrews, foreman of the Grand Jury presented by the foreman of the Grand Jury in Open Court in the Superior Court of the State of California in and for the City and County of San Francisco, and filed as a record of said Court this 13th day of July A. D. 1905. John J. Greif, Clerk. By J. B. Martin, Deputy Clerk. Lewis F. Byington, District Attorney.

31 "E."

THE PEOPLE OF THE STATE OF CALIFORNIA
against
GEORGE D. COLLINS.

In the Superior Court of the City and County of San Francisco, State of California, the 29th day of December A. D. Nineteen hundred and five, George D. Collins is accused by the Grand Jury of the said City and County of San Francisco, by this indictment of the crime of felony, to wit: perjury committed as follows: That on the 12th day of December A. D. Nineteen hundred and five at the said City and County of San Francisco, State of California in the Superior Court of the State of California in and for the City and County of San Francisco, Department No. 11 thereof, there was then and there pending and at issue and on trial before said Court

sitting with a jury duly impanelled and sworn to well and truly try the issues in said action, and a true verdict rendered according to the evidence, a certain action wherein the People of the State of California were plaintiffs and the said George D. Collins was defendant, said action being numbered 16130 of the records of the said Superior Court; that the said Court aforesaid then and there had and obtained jurisdiction to hear and try said action according to the laws of the State of California and to determine and decide all matters of law arising therein and was then and there duly empowered to administer the law in said trial and said action and then and there had jurisdiction of the merits of said action; that then and there to wit; on said 12th day of December Nineteen hundred and five in said action and upon said trial in said Court and at said City and County of San Francisco, State of California, the said George D. Collins offered himself as a witness in his own behalf and duly appeared and was called as a witness therein in his own behalf; that then and there one J. B. Martin was the duly appointed qualified and acting Deputy County Clerk of the said City and County
32 of San Francisco, State of California and an officer authorized by law to administer oaths and then and there duly authorized and empowered by law to administer an oath to said George D. Collins; and the said J. B. Martin did then and there to wit; on the said 12th day of December, Nineteen hundred and five at said City and County of San Francisco, and in the trial and action wherein the People of the State of California were plaintiff and said George D. Collins defendant, administer an oath to the said George D. Collins in due form of law and said oath so administered was then and there taken by the said George D. Collins and the said oath so administered and so taken was that he the said George D. Collins would testify to the truth, the whole truth and nothing but the truth on said trial in said action; that the said J. B. Martin then and there had power, authority and jurisdiction to administer said oath; and the said George D. Collins being then and there so sworn and after having taken said oath as aforesaid and then and there being a witness in said cause as aforesaid, did then and there upon and in said trial and in said action, then and there being heard by said Court, wilfully, unlawfully, corruptly, falsely, feloniously and contrary to the said oath by him the said George D. Collins then and there taken, testify and swear and state the truth to be in substance as follows and did then and there state as true the following matters and things to wit; that on the 15th day of May, Eighteen hundred and eighty-nine at a church then situated on Eddy street between Octavia and Laguna streets in the City and County of San Francisco wherein a marriage ceremony was performed between the said George D. Collins and one Agnes Newman by a clergyman named Reverend M. D. Connolly and that at said time and place by said Reverend M. D. Connolly, said ceremony was performed in the presence of Thomas E. Curran and Charlotta E. Newman
33 and that then and there in the presence of said parties the said marriage ceremony was performed as follows to wit; the said George D. Collins and said Agnes Newman walked to where the

clergyman was standing at the alter in said church and said Collins spoke to the said clergyman and said "I am Mr. Collins this is the young lady I desire to marry;" that thereupon said clergyman asked "Where is your license" and thereupon said Collins replied "I have it in my pocket, do you want it" and thereupon said clergyman said "you can give it to me in the sacristy;" that thereupon said clergyman asked said Collins if he said Collins desired to marry said Agnes Newman and said Collins thereupon replied that he said Collins did; that thereupon said clergyman asked said Agnes Newman a similar question and wanted to know if said Collins consented to take the said Agnes Newman as his wife and asked a similar question of said Agnes Newman and that all of said questions were answered in the affirmative. That the said testimony then and there given by the said George D. Collins was material to the said action and the said trial hereinbefore described and material to the issues of the said action and trial and was material to the issues tendered in said cause and in so testifying as aforesaid the said George D. Collins testified in a matter material to the said trial and said action and the issues therein; that the said testimony then and there given by the said George D. Collins was false and untrue and was known by the said George D. Collins to be false and untrue at the time the same was so given as aforesaid, and the same was so given by the said George D. Collins wilfully and knowingly; that on said 15th day of May Eighteen hundred and eighty-nine at a church then situated on Eddy street between Octavia and Laguna streets in the City and County of San Francisco, a marriage ceremony
34 was not performed between the said George D. Collins and one Agnes Newman by a clergyman named Reverend M. D. Connolly or by any other person; that at said time and place neither by said Reverend M. D. Connolly nor by any other person was said ceremony so testified to performed in the presence of Thomas E. Curran and Charlotta E. Newman nor in the presence of said parties did George D. Collins and Agnes Newman as so stated by said Collins, walk to where the clergyman was standing at the alter in said church nor did said Collins indicate said Agnes Newman as the young lady he desired to marry nor did said clergyman tell said Collins he could deliver the marriage license to him in the sacristy; nor did said clergyman ask said Collins if he desired to marry said Agnes Newman nor did said Collins reply that he did, nor did said clergyman ask said Agnes Newman a similar question nor did he ask said Collins and want to know from him if said Collins consented to take said Agnes Newman as his wife nor did said clergyman ask a similar question of said Agnes Newman nor were said questions answered in the affirmative; and he the said George D. Collins then and there well knew the said facts; that the truth of the facts were that on the 15th day of May, Eighteen hundred and eighty-nine at a church situated on Eddy street between Octavia and Laguna streets in the City and County of San Francisco a marriage ceremony was performed between said George D. Collins and one Charlotta E. Newman by the said Reverend M. D. Connolly and that at said time and place the said George D. Collins and the said

Charlotta E. Newman in the presence of Thomas E. Curran and Agnes Newman were asked by the said clergyman, the Reverend M. D. Connolly if they would take each other for husband and wife and the said George D. Collins then and there consented to marry the said Charlotta E. Newman and the said Charlotta E.
35 Newman then and there consented to marry the said George D. Collins and the said George D. Collins stated that he took the said Charlotta E. Newman as his wife and the said Charlotta E. Newman stated that she took the said George D. Collins as her husband and a marriage ceremony was performed by the said Reverend M. D. Connolly between the said George D. Collins and said Charlotta E. Newman, all of which said George D. Collins knew at the time he so testified as aforesaid; and so knowing the said George D. Collins then and there wilfully, unlawfully, feloniously, knowingly and contrary to his said oath and knowing his said testimony to be false, testified as hereinbefore specifically set forth and he the said George D. Collins did then and there and thereby swear falsely and feloniously commit wilful perjury contrary to the form, force and effect of the statute in such cases made and provided and against the peace and dignity of the People of the State of California.

LEWIS F. BYINGTON,
District Attorney.

Names of witnesses examined before the Grand Jury on finding the foregoing indictment: J. B. Martin, P. B. Elderkin, Thomas E. Curran, M. D. Connolly, William Newman.

STATE OF CALIFORNIA.
City and County of San Francisco, ss:

I, John J. Greif, County Clerk of the City and County of San Francisco, State of California and Clerk of the Superior Court thereof, do hereby certify the within to be an original indictment duly presented by the Grand Jury of the City and County of San Francisco to the Superior Court of the said City and County of San Francisco in open court on the 29th day of December Nineteen hundred and five and filed as a record of said court.

In witness whereof I have hereunto set my hand and the
36 seal of said Court this 29th day of December A. D. Nineteen hundred and five.

[SEAL.] JOHN J. GREIF, *Clerk,*
By J. B. MARTIN, *Deputy.*

Endorsed: No. 16415. Superior Court, City and County of San Francisco State of California. The People of the State of California *vs.* George D. Collins Indictment for felony to wit: perjury a true bill. Edward H. Mitchel, foreman of the Grand Jury presented by the foreman of the Grand Jury in the presence of the Grand Jury in open court in the Superior Court of the State of California in and for the City and County of San Francisco and filed as a record of said Court this 28th day of December A. D. 1905. John J. Greif, Clerk By J. B. Martin, Deputy Clerk. Lewis F. Byington, District Attorney.

37 In the Supreme Court of the State of California.

In the Matter of GEORGE D. COLLINS on *Habeas Corpus.*

Supplemental and Amended Return of Sheriff.

Now comes the respondent herein, the sheriff of the City and County of San Francisco, State of California, files and presents this his Supplemental and Amended Return herein permission of the Court so to do having been first obtained therefor and hereby further certifies as follows: That the extradition warrant referred to in the original Return herein was and is in the words and figures set forth in a copy of the same which is hereunto annexed and marked Exhibit "1" and made a part hereof and this respondent further certifies that upon and under said extradition warrant this respondent holds and detains and imprisons the petitioner herein under a certain Bench Warrant issued out of said Superior Court in case No. 16130 a copy of said Bench Warrant is hereto annexed and marked Exhibit "2" and made a part hereof.

Dated January 14th, 1907.

(Signed) THOS. F. O'NEIL,
Sheriff of the City and County of San Francisco.
(Signed) By E. J. KIRWAN,
Deputy Sheriff.

38 EXHIBIT 1.

Warrant Under the Extradition Act to the Sheriff of the County of Victoria, B. C. the Keeper of the Common Gaol, at the City of Victoria, B. C., and to Thomas B. Gibson, re George D. Collins, Dated 16th October, 1905, Recorded 16th October, 1905, Joseph Pope, Registrar General of Canada.

[OFFICIAL SEAL.]

CANADA.

To the Sheriff of the County of Victoria and the Province of British Columbia, to the Keeper of the Common Gaol, at the City of Victoria in the said County, and Thomas B. Gibson:

Whereas George D. Collins, accused of the crime of perjury committed within the jurisdiction of the United States of America, was delivered into the custody of you, the said Keeper of the common Gaol at Victoria, aforesaid, by warrant of his Honor, Peter Secord Lampman, a Judge under the "Extradition Act," dated the nineteenth day of August, in the year of our Lord, one thousand nine hundred and five, pursuant to the said "The Extradition Act" there to await the surrender to the said United States of America.

Now, I do hereby, in pursuance of the said Act, order you the said sheriff, and you, the said Keeper of the common Gaol, to deliver the said George D. Collins into the custody of the said Thomas B. Gib-

son, and I command you, the said Thomas B. Gibson to receive the said George D. Collins into your custody, and to convey him within the jurisdiction of the said United States of America, and there place him in the custody of any person or persons appointed by the
39 said United States of America to receive him.

For which this shall be your warrant.

Given under the hand and seal of the undersigned Minister of Justice of Canada, this sixteenth day of October, in the year of our Lord one thousand nine hundred and five.

[L. S.] (Signed) C. FITZPATRICK,
Minister of Justice.

Endorsed: Under the "Extradition Act" To the sheriff of the County of Victoria B. C., the Keeper of the Common Gaol at the City of Victoria B. C. and to Thomas B. Gibson *re* George D. Collins, Dated 16th October Nineteen hundred and five. Department of the Secretary of State of County Registrars Branch, Ottowa, 2nd January, Nineteen hundred and seven. I hereby certify the within to be a true and faithful copy of the record of the original warrant as entered in Lib. 172, fol. 340. J. Pope Deputy Registrar General of Canada.

40 *Bench Warrant.*

In the Superior Court, City and County of San Francisco, State of California.

Department No. —.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

The People of the State of California to any sheriff, constable, marshal or policeman of this State:

An indictment having been filed by the Grand Jury of the City and County of San Francisco on the 13th day of July A. D. 1905, in the Superior Court of the City and County of San Francisco, charging George D. Collins with the crime of felony, to wit perjury, you are therefore commanded forthwith to arrest the above named George D. Collins and bring him before the Court to answer the charge or if the Court having adjourned for the term that you deliver him into the custody of the sheriff of the City and County of San Francisco, or if he should require it, that you take him before any magistrate in that county or in any county in which you arrested him that he may give bail to answer the charge.

Given under my hand with the seal of the Court affixed this the 13th day of July, A. D. 1905.

By order of the Court.

JOHN J. GREIF,
County Clerk of the City and County of San Francisco and ex-officio Clerk of said Court.
By THOMAS L. DORAN,
Deputy Clerk.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, John J. Greif, County Clerk of the City and County of San Francisco, S[illegible] of California, and *ex-officio* clerk of the Superior Court thereof, which court is a court of record having a seal, do hereby certify that Thomas L. Doran whose name is sub-
41 scribed to the attached Bench Warrant was at the time of signing the same a Deputy County Clerk in and for said City and County duly appointed, acting and qualified and authorized by law to sign bench warrants and full faith and credit are due to all his official acts as such and I do further certify that I am well acquainted with the handwriting of the said Thomas L. Doran and verily believe that the signature to the said Bench Warrant is genuine.

In witness whereof I have hereunto set my hand and affixed the seal of the said Superior Court at my office in the said City and County this 15th day of July A. D. 1905.

[Seal of the Superior Court of the City and County of San Francisco.]

JOHN J. GRIEF,
County Clerk and ex-officio Clerk of the Superior Court.

Endorsed: Supplemental and Amended Return. Filed January 14th, 1907. F. L. Caughey, Clerk By Dryden, Deputy.

42 In the Supreme Court of the State of California.

Crim., No. 1374.

Ex Parte GEORGE D. COLLINS on *Habeas Corpus.*

Exceptions to Return to Writ of Habeas Corpus and to Answer to Petition.

To the Honorable the Supreme Court of the State of California:

Comes now the petitioner George D. Collins and excepts to the sufficiency of the Return to the Writ of *Habeas Corpus* issued in the above entitled matter and also to the Answer to the Petition on file herein and says that as a matter of law the said Return and said Answer furnish no cause sufficient in law for the imprisonment or detention in custody of the petitioner; nor warranting his imprisonment or detention by the sheriff of the City and County of San Francisco.

2. And further excepting to the sufficiency of said Return in point of law the petitioner excepts to the sufficiency of the "Commitment" set forth in said return to wit: the alleged commitment averred in said Return to have been issued out of the Superior Court of the State of California in and for the City and County of San Francisco,

Hon. Albert G. Burnett Judge, a copy of which is annexed to said Return, marked "A" and alleges that said commitment is null and void and is in excess of the jurisdiction of said Superior Court and of the said Hon. Albert G. Burnett, Judge, and further that the said Hon. Albert G. Burnett is not and never was a judge of the said Superior Court and never was vested with authority valid in law to hold a session of said Superior Court nor to pronounce or render the judgment set forth in said "commitment." The petitioner presents his petition on file herein as a traverse to said Return
43 in accordance with the rule laid down in *re Smith*, 143 Cal. 368.

The petitioner further excepts to the sufficiency of said Return in so far as it relates to said "Commitment" in that said "Commitment" and the judgment therein set forth are in violation and in contravention of the Treaty of Extradition between the United States and Great Britain and of the Extradition laws of the Dominion of Canada and of the stipulation between the United States and Great Britain upon which the extradition was granted and obtained and of section 5275 of the Revised Statutes of the Unted States; and of section One of the Fourteenth Amendment of the Constitution of the United States in operating to deprive the petitioner of his liberty without due process of law and in violation and in contravention of the federal custody of the petitioner vested in the United States by virtue of the extradition set forth in said petition. That said petition on file herein is hereby specially referred to and made a part hereof as fully as though set forth in these exceptions in *haec verba*. That the judgment and order of imprisonment set forth in said Return are the same judgment and order referred to in said petition as having been given and rendered in the action numbered 16415 in said Superior Court and in that behalf the petitioner relies upon and urges said petition and the matters therein set forth, as being and constituting his traverse to said Return. That there is no authority of law for the issuance of said commitment and judgment by virtue of "an indictment returned by the Grand Jury of the City and County of San Francisco, numbered 16415."

3. The petitioner also excepts to the sufficiency of said Return in respect to the "Certificate of Probable Cause" therein alleged and avers that in point of law inasmuch as the said judgment and
44 order of imprisonment are null and void and in excess of the jurisdiction of said Superior Court, the said "Certificate of Probable Cause" furnishes no authority or warrant or jurisdiction for the imprisonment of the petitioner and that as a matter of law the said "Certificate of Probable Cause" is nothing more than a stay of execution or supersedeas upon said judgment. And further and in support of this exception to the sufficiency of said Return in respect to said "Certificate of Probable Cause," the petitioner hereby urges and relies upon his petition on file herein as a traverse to said Return.

4. The petitioner further excepts to the sufficiency of said Return in respect to the warrant of surrender and of extradition in this that a copy of said warrant of surrender and of extradition is not an-

nexed nor attached to nor set forth in said Return nor is the original warrant of surrender and of extradition produced by the sheriff of said City and County of San Francisco or at all. The petitioner demands the production of said original warrant of surrender and of extradition and further demands that a true copy thereof be annexed to said Return.

The petitioner further avers that in respect to said extradition no order or warrant or process or authority or direction in writing is produced by said sheriff nor a copy attached to said Return pursuant to which said sheriff holds or detains said petitioner in his custody or imprisons him. And the petitioner hereby refers to and relies upon and makes a part hereof as though fully set forth, his said petition on file herein as his traverse to said Return in respect to said warrant or surrender and of extradition and in defeasance of his alleged imprisonment and detention by virtue of said warrant. And avers that the indictment upon which said warrant is alleged
45 in said Return to have been granted by Great Britain charges no crime or public offense and has no authority for said warrant.

5. The petitioner excepts to the sufficiency of said Return in respect to the Bench Warrant, a copy of which is set forth in said Return and avers that said Bench Warrant is *functus officio* and void on its face and is in excess of the jurisdiction of said Superior Court and in violation and in contravention of the Treaty of Extradition between Great Britain and the United States and of the Extradition laws of Canada and of section 5275 of the Revised Statutes of the United States; and of section One of the Fourteenth Amendment of the Constitution of the United States in operating to deprive the petitioner of his liberty without due process of law and in contravention and in violation of the Federal custody vested in the United States by virtue of the Extradition of your petitioner from the Dominion of Canada. And your petitioner hereby refers to and makes part of this exception as though fully set forth herein the said petition for the Writ of *Habeas Corpus* as a traverse to said Return.

6. The petitioner excepts to the sufficiency of the said Return and Answer in respect to its averment that the warrant of extradition does not contain certain recitals to wit: that "the petitioner should " not be tried nor triable for or on account of any other offense than " the one on which said extradition has been granted, to wit: the said " crime of perjury charged in said indictment until after the final " conclusion of his trial for the said offense and until his final dis- " charge from custody or imprisonment for or on account of such " offense and thereafter until he has had a reasonable opportunity " of returning from the country from which he was taken on said
" extradition." And petitioner hereby presents and urges his
46 petition on file herein and as though fully set forth in this exception as a traverse to said Return in that respect.

7. Petitioner excepts to the sufficiency of said Return and Answer in respect to the denial therein that the United States accepted or received the surrender or extradition of the petitioner only upon the terms and conditions referred to in said Return and Answer. And

in this behalf also the petitioner hereby presents and urges the averments of his petition on file herein as a traverse to said Return and Answer and as indicating the insufficiency thereof.

8. Petitioner excepts to the sufficiency of said Return and Answer in respect to the denial therein that he was not a resident or inhabitant or domiciled in the City of Victoria on the 7th day of July, 1905, and thereafter and until his surrender in the extradition proceedings.

9. Petitioner excepts to the sufficiency of said Return and Answer in respect to the denial therein that his custody was taken and accepted by the United States in trust for the sole or exclusive purpose of bringing him to final trial before said Superior Court on the criminal charge set forth in the indictment upon which he was extradited and upon no other criminal charge and to the exclusion of every other indictment, whether the offense be prior or subsequent to the extradition. And also excepts to the sufficiency of said Return and Answer in respect to the denial therein that the petitioner was surrendered and extradited upon the condition he should not be tried for any subsequent offense pending the final determination of the charge upon which said extradition was granted or obtained. And the petitioner presents and urges his said petition as a traverse to said Return and Answer.

10. Petitioner excepts to the sufficiency of said Return and
47 Answer in respect to its averments concerning the pendency of an appeal taken by the petitioner from the judgment referred to in said Return and in respect to the fact of said appeal being "probably upon the calendar of the District Court of Appeal for argument for January 21st, 1907."

11. Petitioner excepts to the sufficiency of said Return and Answer in respect to the averments thereof and good cause was shown by the District Attorney and determined by the Court to exist for the postponement of the second or further trial of the case numbered 16130 and of the extradition charge.

12. In each and every particular not hereinbefore mentioned the petitioner hereby excepts to the sufficiency of said Return and of said Answer to the petition.

Wherefore the petitioner prays that these his exceptions to the sufficiency of said Return to the Writ of *Habeas Corpus* and to the Answer of respondent to the petition for a Writ be sustained and the imprisonment of the petitioner be adjudged unlawful and he be ordered by your Honorable Court discharged from said imprisonment and restored to his liberty.

(Signed) GEORGE D. COLLINS,
Petitioner in Pro Per.

Endorsed: Petitioner's Exceptions to Sufficiency of Return etc., filed January 15, 1907. F. L. Caughey, Clerk. By Erb, Deputy.

48 In the Supreme Court of the State of California.

Crim., No. 1374.

Ex Parte GEORGE D. COLLINS on *Habeas Corpus.*

Exceptions to Supplemental and Amended Return of Sheriff.

To the Honorable the Supreme Court of the State of California:

Comes now the petitioner George D. Collins and excepts to the sufficiency of the supplemental and Amended Return of the sheriff of the City and County of San Francisco filed herein this 14th day of January A. D. 1907 as his Supplemental and Amended Return to the Writ of *Habeas Corpus* heretofore issued in the above entitled matter and this petitioner says as a matter of law the said Supplemental and Amended Return of said Sheriff furnishes no cause sufficient in law for the imprisonment or detention in custody of the petitioner or warranting his imprisonment or detention by the sheriff of the City and County of San Francisco.

2. And further excepting to the sufficiency of said Supplemental and Amended Return of said sheriff the petitioner avers in respect to the said alleged warrant of extradition set forth in said Supplemental and Amended Return that it does not appear that the United States of America ever appointed any person or persons to receive the said George D. Collins into the custody of such person or persons.

3. That the original warrant of extradition issued by the Government of Canada or the Government of Great Britain is not produced or tendered or offered by the respondent.

4. That the alleged copy of said warrant of extradition set forth in said Supplemental and Amended Return of said sheriff is not
49 authenticated as required by the provisions of subdivision 8 of section 1918 of the Code of Civil Procedure of the State of California or according to the requirements and provisions of any statute or law of the United States.

II.

And further excepting to the sufficiency of said Supplemental and Amended Return of the said sheriff this petitioner the said George D. Collins avers that the alleged Bench Warrant referred to therein is void upon its face in that the same is not in compliance with the requirements of sections 981, 982 and 945 of the Penal Code of the State of California. That the said respondent does not produce before said Court the original bench warrant referred to in said Supplemental and Amended Return; that the said alleged copy of the said bench warrant and the said alleged bench warrant are *functus officio* in that it appears from the facts pleaded and admitted herein that the said petitioner was brought to trial in the cause numbered 16130 in which said alleged bench warrant was issued and that at the conclusion of the trial the jury therein disagreed. That it further appears from the facts admitted that the said petitioner did appear be-

fore the Superior Court of the State of California in and for the City and county of San Francisco and did answer the charge referred to in said alleged bench warrant in said cause 16130.

III.

That the said petitioner also excepts to the sufficiency of said Supplemental and Amended Return of the said sheriff in respect to the said warrant of extradition in this that the same is not a copy of the warrant of extradition as appears from the petition and the original Return and Answer to the Petition heretofore presented by said sheriff and on file herein.

Wherefore this petitioner prays that these exceptions be sus-
50 tained and that he be discharged from the imprisonment referred to in his petition on file herein and for the reasons in said petition set forth and further in support of these exceptions to said Return the petitioner presents his petition as a traverse to the said Supplemental and Amended Return in accordance with the rule laid down in *re Smith,* 143 Cal. 368.

(Signed) GEORGE D. COLLINS, *Petitioner.*

Endorsed: Exceptions to Sufficiency of Supplemental and Amended Return. Filed January 14, 1907. F. L. Caughey, Clerk. By Dryden, Deputy.

51 In the Supreme Court of the State of California.

Crim., No. 1374.

Ex Parte GEORGE D. COLLINS on *Habeas Corpus.*

Answer to Supplemental and Amended Return of Sheriff.

Comes now the petitioner George D. Collins and in answer to the Supplemental and Amended Return of the Sheriff on file herein on the 14th day of January A. D. 1907, denies that the alleged warrant of extradition set forth in said Supplemental and Amended Return of said Sheriff is the warrant of extradition upon which your petitioner was extradited and removed from the Dominion of Canada to the United States and in that behalf your petitioner makes reference to his petition on file herein and to his exceptions on file and urged by him against the sufficiency of the original Return made by said sheriff and the sufficiency of the Answer of said Sheriff to the said petition, and your petitioner further alleges that the United States never did at any time appoint or designate any person or persons to receive your petitioner into the custody of said person or persons and that said United States did not at any time appoint the sheriff of the City and County of San Francisco nor Thomas B. Gibson to receive your petitioner into custody after your petitioner was brought within the jurisdiction of the United States.

Further answering the said Supplemental and Amended Return of said sheriff and in respect to said alleged bench warrant referred to in the said supplemental and amended return, your petitioner avers that the said indictment referred to in said bench warrant was found and presented by the same Grand Jury which had previously
52 found and presented and filed in the Superior Court against your petitioner another indictment charging and accusing him of having committed the crime of bigamy upon the alleged ground that he had theretofore intermarried with one Charlotta E. Newman on the 15th day of May A. D. 1889, by means of a marriage ceremony at St. John's Church in the City and County of San Francisco before witnesses, to wit: Thomas E. Curran and Agnes M. Newman and that such marriage ceremony was performed by the Reverend M. D. Connolly; that the said alleged marriage ceremony and the said alleged marriage are the same marriage and ceremony alleged and referred to in the indictment upon which the said alleged bench warrant was issued in said cause No. 16130; that the Grand Jurors who found the said indictment were by reason of having previously found the said indictment on said bigamy charge and by reason of the facts herein pleaded, disqualified from hearing or considering or finding the said indictment in said cause No. 16130 referred to in said alleged bench warrant; that the said indictment is null and void for the reasons hereinbefore stated and that the said bench warrant is also void for the same reasons in that to wit: the said Superior Court had no jurisdiction over the said indictment in said cause No. 16130 nor to issue the said bench warrant therein.

Further answering said Supplemental and Amended Return of said sheriff this petitioner avers that the indictment upon which the said alleged bench warrant was issued, a copy of which is set forth in the original Return filed herein by the said sheriff does not charge this petitioner with the commission of any crime or public offense known to the laws of the State of California; that in support of this answer this petitioner presents his petition on file herein as a traverse to the said Supplemental and Amended Return
53 of the said sheriff in accordance with the rule laid down in *Re Smith*, 143 Cal., 368.

Further answering the said Supplemental and Amended Return of the sheriff of the City and County of San Francisco, this petitioner denies that the said sheriff holds or detains or imprisons the petitioner under the alleged bench warrant, a purported copy of which is attached to said Return and alleged to have been issued in the cause No. 16130 and denies that said sheriff holds or detains or imprisons the said petitioner under said alleged bench warrant upon or under said extradition warrant or any extradition warrant.

Wherefore petitioner prays that he be discharged from the imprisonment complained of in his petition herein and for the reasons set forth in said petition and that he be ordered restored to his liberty.

(Signed) GEORGE D. COLLINS,
Petitioner.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

George D. Collins being duly sworn deposes and says that he is the petitioner herein; that he has read the foregoing Answer to the Supplemental and Amended Return of the Sheriff of the City and County of San Francisco filed herein and that the matters set forth in affiant's said Answer are true of his own knowledge except as to the matters therein stated upon his information or belief; and that as to those matters he believe it to be true.

(Signed) GEORGE D. COLLINS.

Subscribed and sworn to before me this 14th day of January A. D. 1907.

(Signed) GEORGE H. S. DRYDEN,
Deputy Clerk Supreme Court.

Endorsed: Filed Jan. 14, 1907. F. L. Caughey, Clerk. By Dryden, Deputy.

54 In the Supreme Court of the State of California.

In the Matter of the Application of GEORGE D. COLLINS for a Writ of *Habeas Corpus.*

Order and Decision Overruling Exceptions to Return.

In the above entitled cause the petitioner George D. Collins having in Open Court filed, presented and argued his exceptions to the sufficiency of the return herein to the Write of *Habeas Corpus* heretofore issued in said cause, it is now by the court ordered that the said exceptions as they appear on file in said cause be and the same are hereby overruled, to which decision and ruling the said George D. Collins then and there duly excepted.

55 In the Supreme Court of the State of California.

Crim., No. 1374.

Ex Parte GEORGE D. COLLINS on *Habeas Corpus.*

Answer to Return to Writ of Habeas Corpus.

In the above entitled action the petitioner George D. Collins cometh now and not waiving but insisting upon his exceptions filed herein to the sufficiency of the Return to the Writ of *Habeas Corpus* and to the sufficiency of the Answer of respondent to the petition filed herein, doth now in answer to the said Return on file herein to the said Writ of *Habeas Corpus* heretofore issued, controvert and deny said Return and the matters therein alleged, and as follows, to wit:

Denies that the sheriff of the City and County of San Francisco holds or ever held or imprisons or detained or detains in custody said petitioner under or by virtue of any writ, order, warrant or process other than the judgment and order of imprisonment referred to and set forth in said return and the stay of proceedings thereon by reason of the certificate of probable cause averred in said Return. Denies that the said sheriff holds or ever held or imprisoned or detained or detains in custody the said petitioner George D. Collins under or by virtue of the warrant of surrender and extradition referred to in said Return and avers that neither said sheriff nor his predecessor in the office of sheriff of said City and County, nor Thomas B. Gibson as agent of the State of California ever held or detained the said George D. Collins in custody nor imprisoned him under or by virtue of a warrant of surrender or a warrant of extradition nor a warrant of surrender and extradition and
56 avers that the warrant of extradition by virtue of which the said George D. Collins was surrendered by the Government of Great Britain to the Government of the United States, was never in the possession nor under the control of Thomas F. O'Neil Esq., the sheriff of the said City and County of San Francisco either directly or indirectly nor ever in the possession nor under the control of his predecessor in the office of sheriff of said City and County, either directly or indirectly. Denies that the said George D. Collins was ever delivered at Victoria or anywhere else unto Thomas B. Gibson, a regular or other agent for that purpose of the State of California; and denies that said Gibson as such agent brought said Collins to said City and County of San Francisco; and denies that said Gibson ever in any capacity delivered the said Collins into the custody of any sheriff of the City and County of San Francisco; and denies that the said Gibson or any one else in any capacity ever delivered the said Collins into the custody of the said Thomas F. O'Neil Esq., the sheriff of said City and County of San Francisco nor into the custody of his predecessor in said office, under said or any warrant of extradition. Avers that the warrant of extradition runs to the said Thomas B. Gibson as the agent of the United States and not as agent of the State of California.

Denies that the appeal referred to in said Return will be upon the calendar of the District Court of Appeal for argument on January 21st, 1907, nor will it be on said calendar for many months if at all.

Denies that the petitioner was ever a fugitive from justice.

Denies that good or any cause was ever shown by the District Attorney nor determined by the Superior Court to exist for the postponement of a second or further trial of the extradition case.

57 Denies that on the 24th day of December, 1906, or at any other time or at all the said George D. Collins consented that said extradition case might be continued until January 9, 1907, nor to any other time; but on the contrary objected and excepted to any and every continuance or postponement of said case.

Avers that he has no knowledge, information or belief on the subject sufficient to enable him to answer in respect to the alleged de-

struction of the warrant of extradition and he therefore denies that said warrant of extradition has been destroyed.

Further answering said Return, the said George D. Collins avers that the judgment and commitment referred to in said Return and therein marked "A" was rendered by the Hon. A. G. Burnett who never has been and is not a Judge of the Superior Court in and for the City and County of San Francisco. That the said Hon. A. G. Burnett was appointed by the Governor of said State and without request from any Judge of the said Superior Court, to preside at the trial of the case wherein said judgment was rendered. That at the time of such appointment the Hon. E. C. Hart, Judge of the Superior Court in and for the County of Sacramento had been previously requested and appointed by said Governor to preside at the trial of said case and to render judgment therein in the event of a conviction. That said Governor had no authority or power to appoint the said Hon. A. G. Burnett to preside during the trial or render judgment in said case No. 16415. That there were and always have been twelve judges of the said Superior Court in and for the City and County of San Francisco, any one of whom was fully competent and qualified to preside and act as the Judge of said Superior Court at the trial of said case and to render judgment therein, in case of conviction. That said appointment of the said Hon. A. G.
58 Burnett was not made by said Governor by reason of sickness or absence or disability or other cause affecting any of the Judges of said Superior Court, nor is it the fact that a regular session of said Superior Court in and for the said City and County of San Francisco, could not be held for the trial and determination of said case No. 16415, by reason of any sickness, absence, disability or other cause affecting any of the Judges of said Superior Court, nor was any certificate ever transmitted by the Clerk of said Superior Court or furnished to the said Governor of said State at any time, that by reason of sickness, absence, disability or other cause a regular session of said Superior Court could not be held in said City and County of San Francisco by the judge or judges thereof or by a superior judge requested by the judge or judges of such court to hold such court. That none of the twelve judges of said Superior Court in and for said City and County of San Francisco were disqualified or incompetent to try and determine and render judgment in case of conviction in said cause No. 16415. That upon the arraignment of the said George D. Collins on the indictment in said cause No. 16415 before the Hon. A. G. Burnett and thence ever afterwards at each step in the prosecution, he objected to the said Hon. A. G. Burnett sitting in said cause No. 16415 upon the ground that the said appointment of the said Hon. A. G. Burnett by the Governor of said State is null and void for the reason above stated and on the grounds that the same is in violation of sections 6 and 8 of Article 6 of the Constitution of said State of California and of Sections 160 and 170 of the Code of Civil Procedure of said State. That said Hon. A. G. Burnett overruled each and all of said objections and the petitioner
59 George D. Collins duly and regularly excepted to each of said rulings.

And the petitioner avers that all proceedings in the matter of the prosecution of said action No. 16415 before the said Hon. A. G. Burnett and including said judgment therein are *coram non judice* and void.

For further answering said Return to said Writ of *Habeas Corpus*, the said petitioner George D. Collins presents and urges upon the Honorable Supreme Court of California, his petition on file herein as a traverse of said Return, in accordance with the rule laid down in the case of *In Re Smith* 143 Cal. 368 and avers that his imprisonment by the sheriff of said City and County of San Francisco is unlawful because in contravention and in violation of the Extradition Treaty between the United States and Great Britain and of the Extradition laws of Canada and of section 5275 of the Revised Statutes of the United States and of the Federal custody of the petitioner George D. Collins by the United States, by virtue of his international extradition from Canada and in violation of section one of the Fourteenth Amendment of the Constitution of the United States in depriving him of his liberty without due process of law and also by reason of the facts pleaded in this answer, and in the said petition. Avers that none of the Federal questions raised herein on *Habeas Corpus* can be raised on said appeal pending in said District Court of Appeal, for the reason that the exceptions reserved by the petitioner in said case No. 16415 in the matter of the rulings of the Superior Court on all said Federal questions together with the facts in relation thereto have been arbitrarily and without cause excluded and stricken from the Bill of Exceptions on said appeal, by the Judge who settled and certified to said Bill of Exceptions to wit: the Hon.
A. G. Burnett, notwithstanding that all said exceptions and
60 facts and all said Federal questions together with the rulings of said Superior Court adversely to the petitioner on all said Federal questions, were duly and regularly inserted in the draft of the Bill of Exceptions proposed and served, and presented by petitioner to said Superior Court and to said Judge within the time prescribed by law. That none of the Federal questions raised by the petitioner in his petition on file herein nor any of the facts nor the rulings or exceptions in relation thereto, appear in the record on said appeal but were excluded therefrom over petitioner's objection and exception and by the said Judge and without cause or justification.

Wherefore the petitioner George D. Collins prays that it be adjudged by the Honorable the Supreme Court of the State of California that his imprisonment by said sheriff of the City and County of San Francisco, is unlawful and said petitioner be ordered discharged therefrom and restored to his liberty.

GEORGE D. COLLINS,
Petitioner in Pro Per.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

George D. Collins being duly sworn deposes and says that he is the petitioner herein; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowl-

edge except as to the matters therein stated upon his information or belief; that as to those matters he believes it to be true.

GEORGE D. COLLINS.

Subscribed and sworn to before me this 14th day of January A. D. 1907.

G. H. S. DRYDEN,
Deputy Clerk Supreme Court.

60½ [Endorsed:] Crim. No. 1374. In the Supreme Court of the State of California. *Ex Parte* George D. Collins on *Habeas Corpus.* Answer of Petitioner to Return to Writ of *Habeas Corpus.* Filed Jan. 14, 1907. F. L. Caughey, Clerk, By Dryden, Deputy.

61 *Opinion of Court.*

A writ of *habeas corpus* was issued on the application of George D. Collins, who claimed to be unlawfully restrained of his liberty by the sheriff of the city and county of San Francisco. A return was made and a hearing had.

Before proceeding to a consideration of the merits of the application, it may be well to here repeat what was orally stated at the hearing regarding the practice of this court on *habeas corpus.* The function of the petition is to secure the issuance of the writ, and, when the writ is issued, the petition has accomplished its purpose. The writ requires a return by the officer or other person having the custody of the prisoner. To such return the petitioner may present exceptions, raising questions of law, or a traverse, raising issues of fact, or both. Where the return is not subject to exception, that is, where it sets forth process which on its face shows good ground for holding the prisoner, such process being produced at the hearing (Pen. Code, sec. 1480), and the traverse alleges matter tending to invalidate the apparent effect of such process, the burden of proving such new matter is on the petitioner. The remarks in *In re Smith,* 143 Cal. 358, are to be taken as referring only to the case where, by agreement of the parties and the consent of the court, the petition is treated as a traverse to the return, and its averments are not disputed. This course has frequently been followed in this court, but, where it is followed, it does not require the respondent to file, in addition to the return, a pleading specifically denying the affirmative allegations of the petition (treated as a traverse) nor does it shift the burden of proof as to such allegations from the petitioner to the respondent. To adopt the analogy of pleadings in civil actions, the return is the complaint, the traverse is the answer; new matter set up in the traverse is deemed denied, and must be proved by the party alleging it.

In this case the petitioner filed exceptions to the return, which were overruled. He then filed a traverse. Evidence was taken and the substantial facts disclosed are the following:

On the 13th day of July, 1905, an indictment charging the petitioner with the crime of perjury alleged to have been committed in the city and county of San Francisco on the 30th day of June, 1905, was found by the grand jury and filed in the superior court of the city and county of San Francisco. Said indictment was designated in said superior court by number 16,130. After the alleged commission of said crime and prior to the finding of the indictment Collins had departed from the jurisdiction of said court and gone to the city of Victoria in the Province of British Columbia, Dominion of Canada. Steps were duly taken to demand his surrender pursuant to the extradition treaty between the United States of America and Great Britain, and on the 27th day of October, 1905, Collins was surrendered and extradited, and removed from the city of Victoria to the city and county of San Francisco. Being there arraigned upon said indictment, he pleaded not guilty, and the case went to trial. Such trial resulted in a disagreement of the jury in the month of December, 1905, and a second trial has not since been had.

In the course of said trial the defendant became a witness and testified in his own behalf, making certain statements under oath which were, after the disagreement of said trial jury, made the basis of a second indictment for perjury found on the 29th day of December, 1905. This second indictment filed in the superior court, and numbered 16,415, charged Collins with having committed perjury in giving his testimony in his own defense on the 12th day of December, 1905. The district attorney proceeded to trial upon the second indictment against the objection of Collins, and such trial resulted in a verdict of conviction; whereupon judgment was pronounced. An appeal from the judgment was taken and is now pending in the district court of appeal.

The principal contention of the petitioner is that inasmuch as he was extradited from the Dominion of Canada upon a specific indictment, No. 16,130, the state of California could not try him upon any other charge until his trial upon the original charge had first been brought to a final conclusion, and he had been given a reasonable time within which to return to the country from which he had been extradited. So far as relates to international as distinguished from inter-state extradition, this is undoubtedly, the general rule. (*Commonwealth v. Hawes*, 13 Bush [Ky.] 697; *State v. Vanderpool*, 39 Ohio St. 273.) The subject was very fully considered by the Supreme Court of the United States in the leading case of the *United States v. Rauscher*, 119 U. S. 407, where the court, after considering all of the authorities then existing, reached the conclusion that under a treaty of extradition providing for the surrender of persons accused of specific crimes, taken together with sections 5272 and 5275 of the Revised Statutes, "a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to

the country from whose asylum he had been forcibly taken under those proceedings."

In the Rauscher case, as well as in every other case that has been called to our attention, the crime for which it was sought to try the extradited prisoner was one alleged to have been committed prior to his extradition. In the present case, on the contrary, the crime with which Collins was charged and of which he was convicted, was committed after his surrender by the authorities of the
62 country in which he had sought a refuge, and after his return to the state of California.

The question is whether the immunity against prosecution for another offense, declared in United States *v.* Rauscher and similar cases, extends to an offense committed subsequent to the extradition. No doubt there is language in United States *v.* Rauscher, general in its terms, which, taken without regard to the facts before the court, would lend countenance to the view that the prisoner is, until the conclusion of his trial for the offense on which he was extradited, and for a reasonable time thereafter, absolutely immune from prosecution on any other charge. It is an elementary doctrine, however, that expressions in judicial opinions are to be read in the light of the facts before the court, and it is necessary, therefore, to consider the grounds upon which the decision in this class of cases went in order to determine whether those grounds are applicable to the case of a crime committed after the extradition.

The reasoning of United States *v.* Rauscher is substantially this: That in the absence of treaty there is no obligation upon any country to surrender to another, persons who are charged with crime in the latter country. That as a matter of comity such surrender might be made, but that if made in pursuance of a demand or request for the surrender of a person accused of a specific crime, there is an implied undertaking on the part of the country receiving the surrender that such surrender is asked and received for the purpose of putting the accused on trial for that crime and for no other purpose. When a treaty is adopted, providing for the surrender of persons accused of specific crimes, the same implied obligation exists, more particularly in view of the provision generally found in treaties of extradition that, before any surrender shall be made, there must be some proof of the commission of the offense. To permit a country to seek the extradition of a person found in another country upon the ground that he is charged with the commission of a specific offense covered by an extradition treaty and then, when his surrender has been granted upon that ground, to try him for some other offense would make it possible to evade the provisions of the treaty, and to use it as a pretense for securing possession of the person of a prisoner whom it was not designed to try for the charge upon which his extradition was nominally sought, but for some other offenses which might or might not be in itself extraditable. In the language of the court in the case under consideration, "it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceed-

ings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted his extradition."

The doctrine, then, seems to rest ultimately upon the view that the treaty of extradition is intended to provide for the surrender of persons who may have fled from one country to another after committing one of a number of designated crimes, and that it would be a breach of international faith to use the provisions of this treaty for any other purpose than the one which is stated in the demand for the surrender, namely, that the prisoner may be put upon his trial for the specific offense designated in the proceedings. In the absence of this limitation, it would be possible to make up a fictitious case coming nominally within the terms of the treaty, and, having secured possession of the prisoner, to then disregard the charge upon which he was extradited, and proceed to try him upon some other offense which could not have been made the basis of extradition, because not covered by the treaty, or a charge on which extradition, even if the crime charged was named in the treaty, might have been refused.

But no such considerations apply to the case of an offense committed after the surrender and return of the accused. While it may be the policy of a country in which a person has taken refuge to grant him the right of asylum except as against a specific charge of a crime covered by a treaty of extradition, such country, after it has once extradited him, cannot be concerned in securing for him immunity for new crimes committed after his return to the demanding country. The obligation assumed by the country demanding the surrender is that such surrender will not be used for the purpose of putting the prisoner on trial for any other offense which he may be claimed to have committed before he sought the asylum of the foreign country, but we cannot see that there would be any breach of international faith in compelling him, in common with other persons within the jurisdiction, to assume responsibility for any offense which he may commit after his return. In such case there is no possibility of the extradition proceedings being used as a subterfuge to pursue the accused for an offense other than the one for which he was extradited. In the absence of any authority compelling such conclusion, we are not prepared to hold that a person extradited under a treaty may, after his return, and pending his trial upon the extradition charge, commit any crime, however atrocious, with absolute security against prosecution until he shall have had an opportunity to return to the country from which he was taken.

The immunity of an extradited prisoner from prosecution for any offense other than the one for which he was extradited rests not upon any absolute right in him to have an asylum in the land in which he has taken refuge, but primarily upon the rights of the sovereignty which has surrendered him, and has done so pursuant to a treaty. This is illustrated by the many cases holding that where an accused is forcibly seized in another country and transferred by violence, force or fraud to this country, without resort to any extradition

treaty, he cannot rely on the circumstances of his removal to defeat his prosecution and trial when here. (*Ex parte Scott,* 9 Barn. & C. 446; *Lopez & Sattler's Cases,* 1 Dearsley & B. C. C. 525; *State v. Smith,* 1 Bailey [S. C.] Law 283; *State v. Brewster,* 7 Vt. 118; *Dow's Case,* 18 Pa. 37; *State v. Ross,* 21 Iowa 467; *The Richmond v. U. S.,* 9 Cranch 102. See also *Ker v. Illinois,* 119 U. S. 436; *In re Mahon,* 34 Fed. 525.)

"The fundamental principle upon which the doctrine of these cases rests, is this: the criminal himself never acquires a personal right of asylum or refuge from the consequences of his crime anywhere. The government of the state or country to which he flees may insist that he shall not be extradited from there unless
63 by its consent and under such conditions as it shall assent to." (Hawley on International Extradition, 15.)

In the Rauscher case itself, there are one or two expressions indicating that the court intended to limit the doctrine declared to cases of offenses committed prior to the extradition. In speaking of the right of the accused, the court says: "That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up; and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime *committed previous to his extradition.*"

And at another place the opinion refers to the immunity from arrest, trial and conviction for a crime "not enumerated in the extradition treaty *and committed before his removal.*" (The italics are ours.)

Much force is added to the view that the accused is not protected from prosecution for crimes committed subsequent to his extradition by a consideration of the terms of the treaty under which Collins was surrendered.

The treaty involved in the Rauscher case was that of 1842 with Great Britain. That treaty merely provided for the surrender by the respective contracting governments of persons charged with certain enumerated crimes, the surrender to be made upon such evidence of criminality as would justify arrest and commitment for trial in the country which was asked to surrender the accused. There was no express limitation as to the crimes for which the accused might be tried after surrender. Such limitation was held by the court to be implied in the nature of the treaty itself and there was no occasion to define its precise extent.

In 1889 the United States of America and Great Britain concluded an extradition convention, which, after referring to the treaty of 1842, made certain further provisions. Article III of the treaty of 1889 reads as follows: "No person surrendered by or to either of the High Contracting Parties shall be triable or tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered." By this provision the contracting governments reduced

to an express and definite agreement the exemption which had been before implied. It seems clar that in limiting the exemption to crimes committed prior to extradition, the contracting parties indicated their intent that persons surrendered should not be exempt from prosecution for crimes subsequently committed. If under the former treaty there was any exemption for such subsequent crimes (which as we have said was not in our opinion the case) such exemption was removed by the new treaty.

It is urged that the effect of article III of the treaty with Great Britain is modified by the provisions of article VI of the same treaty, providing that: "The extradition of fugitives under the provisions of this convention and of the said Tenth Article (of the Treaty of 1842) shall be carried out in the United States, and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering state." We are not furnished with any copies of the laws of the Dominion of Canada and none are at the present time accessible to us. On the hearing the petitioner, after qualifying as a witness regarding the laws of Canada, testified that the extradition act of Canada provided that, "This act shall not authorize the issue of a warrant for the extradition of any person under the provisions of this statute, to any state or country in which, by the law in force in such state or country, such person may be tried after such extradition for any other offense than that for which he was extradited, unless an assurance shall first have been given by the executive authority of such state or country that the person whose extradition has been claimed shall not be tried for any other offense than that on account of which such extradition has been claimed."

For the reasons already stated we do not think that this statute was intended to protect persons surrendered from trial for subsequent offenses, but it was, its only effect was to lay down a rule for the government of officials of the Dominion of Canada. They may, under this act, have had the right to refuse to surrender the accused without receiving the assurance referred to in the act. If they did surrender him without such assurance, the rights of the United States and of the State of California after receiving the prisoner were limited only by the provisions of the treaty, and that treaty, as we have seen, did not prevent trial for a subsequent offense.

In this connection it may be observed that the petition for the writ of *habeas corpus* alleged as a fact that the warrant of extradition issued by the Canadian government, and upon which the prisoner was returned to this country, contained an express provision that the petitioner "should not be tried or triable for or on account of any other offense than the one upon which such extradition shall be granted . . . until after the final conclusion of his trial for said offense and until his final discharge from custody or imprisonment for or on account of such offense, and thereafter, until he has had a reasonable opportunity of returning to the country from which he was taken on said extradition." The original warrant was destroyed in the conflagration of April 18, 1906. Without deciding that the language quoted, if inserted in the warrant, would affect the right of the state to try the accused on the second indictment,

it is sufficient to say that the evidence taken on the hearing absolutely negatives the claim of the petitioner and shows conclusively that no such language was inserted in the warrant.

There is, in our opinion, nothing in the provisions of section 5275 of the Revised Statutes of the United States which conflicts with the views herein expressed.

It is further contended by petitioner that the perjury with which he was charged in the second indictment consisted in swearing to some of the same matters which formed the basis of the charge of perjury in the first indictment. From this it is argued that a verdict of acquittal on the first charge would be conclusive in favor of the defendant on any subsequent trial. (*U. S. v. Butler*, 38 Fed. Rep. 498; *Coffey v. U. S.*, 116 U. S. 436; *Cooper v. Com.*, 51 S. W. Rep. 789.) Similarly, it is claimed, a verdict of conviction on the first charge would preclude a conviction on the other. We need not decide whether the principle invoked has any application to the facts here presented. In any event, such acquittal or conviction in one trial, is matter of defense to be relied on in the other. It does not go to the jurisdiction, and affords no ground for release on *habeas corpus*.

64

For these reasons we are satisfied that the state of California did not violate any treaty obligation of the United States, or any right of the accused, in putting him to trial upon the second indictment, and that he is properly held in custody by the sheriff pursuant to the judgment of conviction.

The sheriff also claims to hold the petitioner by virtue of a bench warrant issued upon the first indictment, namely, the one which was the basis of the extradition proceedings. As to this the petitioner claims to have been released on bail. The destruction of the public records of the city and county of San Francisco in the conflagration of April, 1906, makes it difficult to determine the truth of this claim. The evidence upon it is conflicting. We have reached the conclusion that the weight of evidence is to the effect that the prisoner, after having given bail upon this charge, voluntarily surrendered himself into custody and that he has not since given bail.

Nor has he offered any evidence in support of his allegation that his trial on this charge has been unreasonably postponed against his objection and that the prosecution has no *bona fide* intention of putting him to trial on this indictment. He is therefore properly in custody of the sheriff on the bench warrant issued under the indictment in case 16,430, and the extradition proceedings thereon, as well as the judgment of conviction in case 16,415.

Petitioner is remanded to the custody of the sheriff to be held in pursuance of process in both cases.

SLOSS, *J.*

We concur:

HENSHAW, *J.*
McFARLAND, *J.*
SHAW, *J.*
ANGELLOTTI, *J.*
LORIGAN, *J.*
BEATTY, *C. J.*

65 In the Supreme Court of the State of California.

In the Matter of the Application of GEORGE D. COLLINS for a Writ of *Habeas Corpus*.

Judgment.

The above entitled cause having come regularly on for hearing before this Court and the same having been heard and submitted to the Court for its decision and the Court having fully considered the case,

It is now ordered, adjudged and decreed that for the reasons given in the opinion of the Court filed herein on May 22nd, 1907, that the petitioner George D. Collins be and he is hereby remanded to the custody of the sheriff of the City and County of San Francisco, to be by him held in pursuance of process in the case known and designated as Number 16130 in the Superior Court of the State of California in and for the City and County of San Francisco and also in the case known and designated by the Number 16415 in the said Superior Court.

66 In the Supreme Court of the State of California.

GEORGE D. COLLINS, Plaintiff in Error,

vs.

THOMAS F. O'NEIL, the Sheriff of the City and County of San Francisco; THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA, Defendants in Error.

Return to Writ of Error.

This the Answer of the Judges of the Supreme Court of the State of California to the Writ of Error issued herein, the record and all proceedings of the plaint whereof mention is within made with all things touching the same, is certified under the seal of our said Supreme Court of the State of California to the Supreme Court of the United States within mentioned at the day and place within contained in a certain schedule to this Writ annexed as within we are commanded.

By the Court.

[Seal Supreme Court of California.]

FRANK L. CAUGHEY,
Clerk of the Supreme Court of the State of California.
By GEO. H. S. DRYDEN,
Deputy Clerk.

67 In the Supreme Court of the State of California.

In the Matter of the Application of GEORGE D. COLLINS, for the Writ of *Habeas Corpus*.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

This is to certify that I F. L. Caughey, the Clerk of the Supreme Court of the State of California, did on the 17th day of December A. D. 1906, upon the order of the Supreme Court of the State of California, duly issue to the sheriff of the City and County of San Francisco, the Writ of *Habeas Corpus* returnable at the time and place designated by the said Supreme Court.

I further certify that the said Writ of *Habeas Corpus* was duly and regularly returned after service thereof upon the said sheriff and the said Writ with the Return thereto was duly filed in the Clerk's office of the said Supreme Court.

I further certify that the said Writ of *Habeas Corpus* has been mislaid and after diligent search I am unable to find the same.

In witness whereof, I have hereunto set my hand and the seal of the Supreme Court this the 31st day of December A. D. 1907.

[Seal Supreme Court of California.]

F. L. CAUGHEY,
Clerk of the Supreme Court of the State of California,
By GEO. H. S. DRYDEN,
Deputy Clerk.

68 In the Supreme Court of the State of California.

GEORGE D. COLLINS, Plaintiff in Error,
vs.
THOMAS F. O'NEIL, the Sheriff of the City and County of San Francisco; THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA, Defendants in Error.

Certificate of Clerk to Record.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California do hereby certify the foregoing to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the Clerk of the said Supreme Court and that the same constitutes the Return to the annexed Writ of Error as per schedule hereto annexed.

I further certify that the original Writ of Error and Citation issued in said cause are hereto annexed and that true copies of said Writ of Error were upon the 8th day of November A. D. 1907, lodged in the Clerk's office of the Supreme Court of the State of California for each of the Defendants in Error, by the plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of the State of California this 31st day of December A. D. 1907.

[Seal Supreme Court of California.]

F. L. CAUGHEY,
Clerk of the Supreme Court of the State of California,
By GEO. H. S. DRYDEN,
Deputy Clerk.

69 SCHEDULE.

In the Supreme Court of the State of California.

GEORGE D. COLLINS, Plaintiff in Error,
vs.
THOMAS F. O'NEIL, the Sheriff of the City and County of San Francisco; THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA, Defendants in Error.

To the Clerk of the Supreme Court of the State of California.

SIR: Please make return to the Writ of Error issued in the cause entitled In the Matter of the Application of George D. Collins for the Writ of Habeas Corpus, being case numbered Crim. 1374 in the said Supreme Court of California, by certifying to the following documents on file in said cause, viz:

1. Petition for Writ of *Habeas Corpus.*
2. Order Granting Writ of *Habeas Corpus.*
3. Writ of *Habeas Corpus*, or if the same is lost or mislaid, then certificate of the fact that the Writ was issued and returned.
4. Return to Writ of *Habeas Corpus.*
5. Supplemental Return to Writ of *Habeas Corpus.*
6. Exceptions to Return and to Supplemental Return to Writ of *Habeas Corpus.*
7. Order and Decision overruling Exceptions to Return and *and* to Supplemental Return.
8. Answer to Return to Writ of *Habeas Corpus.*
9. Judgment on Writ of *Habeas Corpus.*

70 10. The original Writ of Error.

11. The original Citation on the Writ of Error.
12. Assignments of Error on Writ of Error.

71 In the Supreme Court of the United States.

GEORGE D. COLLINS, Plaintiff in Error,

vs.

THOMAS F. O'NEIL, the Sheriff of the City and County of San Francisco, State of California; THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA, Defendants in Error.

Assignment of Errors.

Afterwards to wit: on the 7th day of November in the year of our Lord, one thousand nine hundred and seven, at the October term for the year A. D. 1907, of the Supreme Court of the United States, at the Capitol in the City of Washington and District of Columbia, comes the said George D. Collins and says that in the record and proceedings in the above entitled cause and also entitled in the Supreme Court of the State of California, "In the Matter of the Application of George D. Collins for the Writ of *Habeas Corpus*," and being cause numbered Crim. 1374 in said Supreme Court of California, there is manifest error in this to wit:

1. That the said Supreme Court of California committed manifest error in refusing to release and discharge the said George D. Collins from imprisonment and in remanding him to the custody of the sheriff of the City and County of San Francisco.

2. That the said Supreme Court of California committed manifest error in deciding that the said George D. Collins is not entitled to his liberty upon the Writ of *Habeas Corpus*, issued by said Court.

3. That the said Supreme Court of California committed
72 manifest error in deciding that the said George D. Collins is not imprisoned in violation of the Extradition Treaty between the United States and Great Britain.

4. That the said Supreme Court of California committed manifest error in deciding that the said George D. Collins is not imprisoned in violation of section 5275 of the Revised Statutes of the United States.

5. That the said Supreme Court of California committed manifest error in deciding that the said George D. Collins is not imprisoned in violation of the law of nations.

6. That the said Supreme Court of California committed manifest error in deciding that the imprisonment of the said George D. Collins complained of in his petition for the said Writ of *Habeas Corpus*, is not in violation of and in conflict with the federal custody, control and jurisdiction acquired by and vested in the United States, under and by virtue of the international extradition of the said George D. Collins from the Dominion of Canada pursuant to the Treaty of Extradition between the United States and Great Britain.

7. That the said Supreme Court of California committed manifest error in deciding that the said imprisonment of the said George D. Collins is not in violation of section one of the Fourteenth Amendment of the Constitution of the United States and in deciding that the said George D. Collins is not by the State of California denied

the equal protection of the laws and in deciding that by said imprisonment he is not by said State of California deprived of his liberty without due process of law.

8. That the said Supreme Court of California committed manifest error in deciding that the prosecution and judgment and the said order of imprisonment against the said George D. Collins in the case mentioned in his said petition for the Writ of *Habeas Corpus* and in said petition referred to as case No. 16415 in the Superior
73 Court of the State of California in and for the City and County of San Francisco, and entitled "People of the State of California *vs.* George D. Collins," are not in violation of the said Extradition Treaty, nor of said federal custody, control or jurisdiction of the United States nor of section 5275 of the Revised Statutes of the United States, nor of the law of nations, nor of section one of the Fourteenth Amendment of the Constitution of the United States and also committed manifest error in deciding that said prosecution and judgment and said order of imprisonment do not operate to deprive said George D. Collins of his liberty without due process of law, nor deny to him the equal protection of the laws.

9. That the said Supreme Court of California committed manifest error in deciding that the said prosecution, and judgment and said order of imprisonment against the said George D. Collins in said case No. 16415 in said Superior Court, and referred to in said petition for said Writ of *Habeas Corpus*, on file in the said Supreme Court of California, do not violate and contravene the Extradition Treaty between the United States and Great Britain.

10. That the said Supreme Court of California committed manifest error in deciding that the said prosecution, and judgment and said order of imprisonment against the said George D. Collins in said case No. 16415 in said Superior Court; and referred to in said petition for said Writ of *Habeas Corpus*, on file in said Supreme Court of California, do not violate and contravene the federal custody, control and jurisdiction of the United States vested by virtue of the international extradition of the said George D. Collins from the Dominion of Canada, pursuant to the Treaty of Extradition between the United States and Great Britain.

11. That the said Supreme Court of California committed
74 manifest error in deciding that the said prosecution and judgment, and said order of imprisonment against the said George D. Collins in said case No. 16415, in said Superior Court, and referred to in said petition for said Writ of *Habeas Corpus*, on file in said Supreme Court of California, do not violate the law of nations.

12. That the said Supreme Court of California committed manifest error in deciding that the said prosecution and judgment, and said order of imprisonment against the said George D. Collins in said case No. 16415, in said Superior Court, and referred to in said petition for said Writ of *Habeas Corpus*, on file in said Supreme Court of California, and the imprisonment in case No. 16130, referred to in the Return to said Writ of *Habeas Corpus* do not violate the provisions of section 5275 of the Revised Statutes of the United States.

12½. That the said Supreme Court of the State of California committed manifest error in overruling the exceptions of plaintiff in error to the sufficiency of the Return to the Writ of *Habeas Corpus*.

13. That the said Supreme Court of California committed manifest error in deciding that the said prosecution, and judgment, and order of imprisonment against the said George D. Collins in said case No. 16415, in said Superior Court, and referred to in said petition for said Writ of *Habeas Corpus*, on file in said Supreme Court of California, and the imprisonment in case 16130, referred to in the Return to said Writ of *Habeas Corpus*, do not violate Section one of the Fourteenth Amendment of the Constitution of the United States nor operate to deprive the said George D. Collins of his liberty without due process of law, nor operate to deny him the equal protection of the laws.

14. That the said imprisonment of the said George D. Collins and the said prosecution and judgment and said order of imprisonment in said case No. 16415, in said Superior Court, are in violation of the Extradition Treaty between Great Britain and the United States.

15. That the said imprisonment of the said George D. Col-
75 lins and the said prosecution and judgment and said order of imprisonment in said case No. 16415 in said Superior Court, are in violation of the law of nations.

16. That the said imprisonment of the said George D. Collins and the said prosecution, and said judgment and said order of imprisonment in said case No. 16415 and the imprisonment in case 16130 in said Superior Court, are in violation of section 5275 of the Revised Statutes of the United States.

17. That the said imprisonment of the said George D. Collins and the said prosecution, and said judgment and said order of imprisonment in said case No. 16415 in said Superior Court, and the imprisonment in case No. 16130, are in violation of and in conflict with the Federal custody, jurisdiction and control of said George D. Collins, vested in the United States by virtue of the international extradition of the said George D. Collins from the Dominion of Canada under and pursuant to the Treaty of Extradition between the United States and Great Britain.

18. That the said imprisonment of the said George D. Collins and the said prosecution, and said judgment and said order of imprisonment in said case No. 16415 in said Superior Court and the imprisonment in case 16130, are in violation of section one of the Fourteenth Amendment of the Constitution of the United States and operate to deny him the equal protection of the laws.

19. That the said George D. Collins is by said prosecution and said judgment and said order of imprisonment in said case No. 16415 in said Superior Court and by his imprisonment in case 16130, deprived of his liberty by said State of California without due process of law, which is contrary to section one of the Fourteenth Amendment of the Constitution of the United States.

20. That for the reasons and upon the grounds stated in said petition of said George D. Collins for the Writ of *Habeas Corpus* on file

in said Supreme Court of the State of California, the said
76 Superior Court of the State of California in and for said City and County of San Francisco, had no jurisdiction to render said judgment or to make said order of imprisonment in said case entitled "People of the State of California *vs.* George D. Collins" and numbered 16415 in said Superior Court. Whereas by the law of the land, the judgment of the said Supreme Court of the State of California should have been in favor of the said George D. Collins and against the said defendants in error and restoring the said George D. Collins to his liberty on *Habeas Corpus* and discharging him from imprisonment; and his application for his discharge upon said Writ of *Habeas Corpus* should have been granted by the said Supreme Court of the State of California.

Wherefore the said George D. Collins, the plaintiff in error herein, now prays that the said order and judgment of the said Supreme Court of the State of California be reversed, annulled and altogether held for naught and that he be restored to all things he hath lost by reason of said order and judgment and by reason of said imprisonment, and that the said Supreme Court of the State of California, be directed to order that the said George D. Collins be discharged from imprisonment and be restored to his liberty.

GEORGE D. COLLINS,
Plaintiff in Error in Pro Per.

76½ [Endorsed:] Crim. 1374. In the Supreme Court of the United States. George D. Collins, Plaintiff in Error, *vs.* Thomas F. O'Neil, the sheriff of the City and County of San Francisco, *et al.*, Defendants in Error. Assignment of Errors. Filed Nov. 7, 1907. F. L. Caughey, Clerk, by Erb, Deputy.

77 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of California, greeting:

Because in the record and proceedings and also in the rendition of a judgment of a plea which is in the said Supreme Court of the State of California, before you, the said Supreme Court being the highest Court of said State of California, in which a decision in the matter could be had, and there being no appeal from the said judgment or other review thereof in any other Court of said State of California permitted or authorized by the laws thereof, and said judgment being final and rendered and entered in a suit and cause and proceeding in the said Supreme Court of California and entitled "In the Matter of the Application of George D. Collins for the Writ of *Habeas Corpus*," being cause numbered Crim. 1374 in said Supreme Court, and wherein the said George D. Collins is the petitioner and Thomas F. O'Neil, the sheriff of the said City and

County of San Francisco, and the People of the State of California and the State of California are the respondents, and wherein was drawn in question by the said petitioner, the plaintiff in error, the validity of an imprisonment of the plaintiff in error by authority exercised under said State of California, on the ground of said authority and imprisonment being repugnant to the Constitution, Treaty and laws of the United States, and the decision was in favor of such the validity of said imprisonment and authority, and wherein was drawn in question the construction of a clause of a
78 Treaty and of a clause of a statute of the United States and the decision was against the title, right, privilege and exemption specially set up and claimed by said plaintiff in error under such clause of said Treaty and under said clause of said statute, and said clause also involving the validity of a judgment and order of the Superior Court of the State of California in and for the City and County of San Francisco, rendered and entered in a certain criminal action in and before said Superior Court prosecuted by the People of the State of California against said George D. Collins, said criminal action being numbered 16415 in said Superior Court, and there having been drawn in question by said George D. Collins before the said Supreme Court of the State of California in said *Habeas Corpus* case, and also in said criminal action, and in said Superior Court, the validity of said judgment and of said order and of the imprisonment by virtue thereof, of the said George D. Collins, by the State of California, and wherein was drawn in question by the said George D. Collins, the validity of the authority exercised under said State of California, by said sheriff by the imprisonment of said plaintiff in error, on the ground that the said judgment and said order and said authority and imprisonment, are repugnant to the Extradition Treaty existing between the United States and Great Britain, and repugnant to the Constitution and laws of the United States, and particularly to Section One of the Fourteenth Amendment of the Constitution of the United States and to Section 5275 of the Revised Statutes of the United States, and the decision of said Supreme Court of the State of California and of said Superior Court were in favor of their validity, whereas in all of which manifest error hath happened, to the great damage and injury of the said George D. Collins, as by his complaint appears, we being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the
79 parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the entire record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this Writ of Error, so that you have the same at Washington in the District of Columbia, on the 7th day of January A. D. 1908, in the Supreme Court of the United States, that the said record and proceedings being there inspected and reviewed, the Supreme Court of the United States may cause further to be

done therein, to correct said error, what of right and according to the laws and customs of the United States should be done.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHLAND HOFFMAN,
Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

Dated November 8th A. D. 1907.

The foregoing writ of error is hereby allowed, the same to operate as a supersedeas according to the customs and laws of the United States. The supersedeas to have the sole effect of keeping the Plaintiffs in error in the same custody in which he now is pending the decision upon this writ.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Dated November 8th A. D. 1907.

79½ [Endorsed.] Crim. 1374. In the Supreme Court of the United States. George D. Collins, Plaintiff in Error *vs.* Thomas F. O'Neil, the sheriff of the City and County of San Francisco *et al.*, Defendants in Error. Writ of Error. Filed Nov. 8, 1907. F. L. Caughey, Clerk. By Erb, Deputy.

80 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

To Thomas F. O'Neil, the sheriff of the City and County of San Francisco, State of California; and to the People of the State of California, and to the State of California, defendants in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington in the District of Columbia, on the 7th day of January in the year of our Lord, one thousand nine hundred and eight, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of California, wherein George D. Collins is the plaintiff in error and Thomas F. O'Neil, the sheriff of the City and County of San Francisco, State of California, and the People of the State of California and the State of California are the defendants in error, to then and there show cause, if any there be, why the order and judgment rendered and entered against the said plaintiff in error, as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 8th day of November, in the year of our Lord One thousand nine hundred and seven.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

81 Service of the foregoing citation upon each of us respectively is hereby acknowledged to have been made in the City and County of San Francisco, State of California, on the 8th day of November A. D. One thousand nine hundred and seven.

THOS. F. O'NEIL,
Sheriff of the City and County of San Francisco.
W. H. LANGDON,
District Attorney of the City and County of San Francisco.
By WM. HOFF COOK,
Ass't Dist. Att'y.
U. S. WEBB,
Attorney General of the State of California.

82 [Endorsed:] (Crim. No. 1374.) Supreme Court of the United States. George D. Collins, Plaintiff in Error, *vs.* Thomas F. O'Neil, the sheriff of the City and County of San Francisco, *et al.*, Defendants in Error. Citation on Writ of Error.

Endorsed on cover: File No. 20,964. California supreme court. Term No. 241. George D. Collins, plaintiff in error, *vs.* Thomas F. O'Neil, Sheriff of the City and County of San Francisco, State of California, *et al.* Filed January 7th, 1908. File No. 20,964.

Office Supreme Court, U. S.
FILED.
DEC 26 1908
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

GEORGE D. COLLINS,
Plaintiff in Error.

vs.

THOS. F. O'NEIL, THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA AND THE STATE OF CALIFORNIA,
Defendants in Error.

No. 241.
OCTOBER TERM, A. D. 1908.

Motion to Advance Cause No. 241, October Term, A. D. 1908, and also Cause No. 320, October Term, A. D. 1908, to be Heard and Determined Together.

GEORGE D. COLLINS,
COUNSEL FOR PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

GEORGE D. COLLINS, *Plaintiff in Error,* *vs.* THOMAS F. O'NEIL, the Sheriff of the City and County of San Francisco, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA, *Defendants in Error.*	No. 241. OCTOBER TERM, A. D. 1908.
GEORGE D. COLLINS, *Appellant,* *vs.* THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA, *Appellees.*	No. 320. OCTOBER TERM, A. D. 1908.

Motion to Advance Cause No. 241, October Term, A. D. 1908, and also Cause No. 320, October Term, A. D. 1908, to be Heard and Determined Together.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States and to the Court:

Comes now GEORGE D. COLLINS, the plaintiff in error and appellant, respectively, in the above entitled

causes and presents to you this, his motion, that the said causes now pending in your Honorable Court, and involving his right to his discharge from existing imprisonment, on *habeas corpus*, be ordered advanced upon the docket of the court to an early hearing, and be heard and determined together. In this behalf and to the end that this motion be granted the plaintiff in error and appellant respectfully urges upon your consideration, that on the record before you, in each of said causes, the following questions are raised, viz.: 1. In a case of international extradition, can the accused be arrested, brought to trial, prosecuted and convicted on a charge entirely different from that upon which he has been extradited? Can he be extradited on one charge and tried on another? Where a person is extradited pursuant to the treaty between the United States and Great Britain, upon a specific and described charge of perjury, can the prosecuting state legally use and divert the custody thus acquired and specially entrusted in execution of the treaty, to the entirely different purpose of prosecuting the accused to trial, conviction and sentence upon another and altogether different charge of perjury, and do this, too, while the extradition charge is pending and awaiting trial to a final conclusion, and in exclusion and in substitution of the extradition case? 2. Is the pre-existing *extradiction jurisdiction* over the person of the accused supreme and exclusive over all other jurisdiction of his person, until the expiration of the time specified in Section 5275 of the Revised Statutes of the United States? 3. Can the accused be legally prosecuted to trial and con-

viction on a charge *different* from the one upon which he was extradited, without first affording him a reasonable time and opportunity to return to the country of asylum? 4. It being the well settled principle of international law as well as of the treaty and of the Federal statute that if pending the final trial and determination of the charge on which the accused was extradited, and prior to the expiration of his right to return to the country of asylum, he commits another offense extraditable in character, he can only be prosecuted and brought to trial on the latter, by virtue of a *new* extradition, where he has not waived his right to return to the country granting the extradition, can this principle of international law be successfully evaded by prosecuting him on the subsequent charge *before* the charge on which he has been extradited is given a trial to a final conclusion, and while it is still pending and while he is still held in custody under the supreme and exclusive authority of the international warrant of extradition? Does this alone control the jurisdiction over his person and to the exclusion of every different prosecution? 5. Can the right to return to the country of asylum on the acquittal and final release of the accused upon the extradition charge, and therein his right necessarily arising to *first* be given for that paramount purpose a trial to a final conclusion on the charge upon which he was extradited, be legally postponed or interrupted, intercepted, or interfered with, by prosecuting him to trial, conviction and sentence on another and different charge, to wit, of having committed a subsequent offense? and if so, can such prosecution be

maintained while the extradition case is still pending and awaiting trial to a final conclusion, and while the jurisdiction over his person is restricted and confined to the supreme authority of the warrant of extradition? 6. Would the arrest, trial and prosecution on a subsequent charge of committing a subsequent offense, if occurring and maintained *while the extradition case is pending* and awaiting trial to a final conclusion, and in exclusion of the extradition case, be a violation of the extradition jurisdiction and of the treaty? 7. Would such arrest, trial and prosecution be a violation of Section 5275 of the Revised Statutes of the United States? 8. Would such arrest, trial and prosecution be in contravention of the supreme and pre-existing extradition jurisdiction over the person of the accused, and in violation of the said treaty and of Section 5275 of the Revised Statutes of the United States, and is such extradition jurisdiction existing for the sole purpose of executing the treaty, *supreme and exclusive*, until it has wrought its function? Can the prosecuting state, having acquired the custody of the accused on the faith alone of the extradition, for one specific purpose, use the custody thus entrusted in execution of the treaty *to another and different purpose, not authorized by the treaty?* 9. Can the prosecuting state legally intercept the due execution of the treaty and the regular course of the extradition case, in its orderly progress to a final conclusion, and supersede the due execution and enforcement of the treaty, and cut off the right to return to the country of asylum, by arresting and prosecuting the accused on another and differ-

ent charge? 10. If the accused is not brought to trial to a final conclusion *within a reasonable time* upon the charge on which he was extradited, does the indictment thereby become null and void and is he entitled under the treaty and the Federal statute to his discharge on *habeas corpus?* And is the period of three years and more a reasonable time, especially in view of the fact that the law of the prosecuting state fixes *sixty days?* 11. Can the prosecuting state lawfully drop and discontinue the prosecution of the extradition case, after getting possession of the accused, on the faith alone of the extradition and on the faith alone of the promise to give him a trial to a final conclusion on the charge upon which his extradition was granted, and permit him to return unmolested and depart in peace to the country of asylum, when acquitted, and *substitute* in its place and stead while the extradition jurisdiction still exists, and still persists in the full supremacy of its exclusive control over the person of the accused, for the sole purpose of executing the treaty, another and different prosecution on another charge, and thereby deprive the accused of the fundamental rights conferred upon him by the treaty, by Section 5275 of the Revised Statutes of the United States and by international law? 12. Has the sheriff of San Francisco any power to imprison the accused under the extradition warrant, the latter expressly restricting its authority to the person appointed by the United States and the sheriff never having been so appointed? All these questions are based upon and sustained by the printed record now before your Honorable Court in each of said causes, affirmatively showing that the appellant and the

plaintiff in error did not at any time waive his rights, but on the contrary at every stage of the proceedings insistently asserted them and interposed at every step his objection and protest, invoking in that behalf the Treaty of Extradition between Great Britain and the United States, and Section 5275 of the Revised Statutes of the United States and the well settled principles of international law pertaining to said questions. That the printed Brief and Argument of appellant and plaintiff in error, on file herein, and consisting of 203 pages, fully presents the principles and cites the authorities on all said questions, and establishes beyond doubt that his imprisonment is in violation of said treaty and of said Federal statute, and of international law. That plaintiff in error and appellant is actually imprisoned by the sheriff of the City and County of San Francisco, State of California, in the county jail of said city and county, and upon no other claim than that of the warrant of extradition and the collateral judgment of conviction hereinafter mentioned; and he is seeking herein to obtain his release and discharge from said imprisonment upon *habeas corpus* and on the grounds that said imprisonment is in violation of the said Treaty of Extradition and of Section 5275 of the Revised Statutes of the United States and of international law. That appellant and plaintiff in error was upon demand of the United States extradited on the 16th day of October, A. D. 1905, pursuant alone to the said Treaty of Extradition, from the Dominion of Canada upon a specific charge of having, on the 30th day of June, A. D. 1905, committed in the City and County of San

Francisco, State of California, the crime of perjury in verifying by his oath the general issue presented by his plea and answer to a complaint filed in a civil suit then pending against him in the Superior Court of the State of California in and for said City and County of San Francisco. That said civil suit never has been brought to trial, nor otherwise disposed of. That the said charge on which he was extradited has never been brought to trial to a final conclusion, but on the contrary and over his objection has been by said State of California and said Superior Court *indefinitely postponed*. That he is nevertheless still imprisoned under the warrant of extradition by said sheriff and in said jail. That said warrant of extradition is in the record, and bears date and was issued on October 16th, A. D. 1905. That notwithstanding the pendency of said extradition case before said Superior Court and awaiting trial to a final conclusion the State of California, on the 29th day of December, A. D. 1905, and against his protest, arrested appellant and plaintiff in error upon an indictment filed in said Superior Court on that date, purporting to charge him with committing another and different offense of perjury, to wit, subsequently to his surrender and in said extradition proceedings and while said extradition case was pending; and said State of California, despite his protest based upon and invoking said treaty and said Section 5275 of the Revised Statutes of the United States and international law, arrested and prosecuted him to trial and conviction, to judgment and sentence on said second charge of perjury, to the exclusion of said extradition case,

and while the said extradition case was still pending before said Superior Court and awaiting trial, and remained undisposed of either by trial to a final conclusion or otherwise; that said extradition case is still undisposed of. That he was by the judgment of said Superior Court sentenced to imprisonment for *fourteen years* in the penitentiary of said State of California on said second perjury charge. That said sentence is final but void, and said sheriff also imprisons appellant and plaintiff in error in said county jail, under said sentence and pending its execution. That after said judgment and sentence, the appellant and plaintiff in error sued out and was granted in the Supreme Court of the State of California, the writ of *habeas corpus* for his release and discharge from said imprisonment, on all of the grounds heretofore stated, and on said *habeas corpus* raised each of the questions hereinabove enumerated, but said court decided all said questions adversely to him and by its judgment expressly remanded him to the custody of said sheriff as existing when said writ of *habeas corpus* was granted, and *to be held by said sheriff in custody upon said warrant of extradition and upon said judgment and sentence on said second charge of perjury;* and said sheriff has ever since imprisoned and does now accordingly so imprison appellant and plaintiff in error, in said county jail, and for no other cause nor upon any other claim or pretense. That the said judgment of said Supreme Court of California is final. That a writ of error was duly sued out and allowed him, from the Supreme Court of the United States to the Supreme Court of the State of Cali-

fornia on said judgment in said *habeas corpus* case. That said writ of error and the citation thereon have been duly served and filed, and the case on said writ of error has been docketed and the record filed and printed in the Supreme Court of the United States, and is there pending and awaiting hearing and determination, and is numbered 241, October Term, A. D. 1908. That the printed brief and argument of appellant and plaintiff in error, consisting of 203 pages, have been filed in said cause No. 241, and also in said cause No. 320, October Term, A. D. 1908, which is an appeal taken and prosecuted by the said George D. Collins, from the final judgment and decree of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California, refusing to grant him, the said appellant, on the facts above stated, the writ of *habeas corpus* for his release and discharge from said imprisonment on the same grounds hereinbefore set forth, and presents the same questions as are presented on said writ of error. That said appeal was duly taken and allowed and citation served; and thereafter the case on said appeal was docketed and the record filed and printed in the Supreme Court of the United States, and is numbered 320, October Term, A. D. 1908, and the case is now pending and awaiting hearing and determination in your Honorable Court.

That upon the facts presented in the said records respectively in each of said cases the said and existing imprisonment of appellant and plaintiff in error is unlawful and in violation of said Treaty of Extradition and of Section 5275 of the Revised Statutes of the United States and of international law; and

he is therefore entitled to a reversal of each of said judgments of the State Supreme Court and the United States Circuit Court respectively, and to his restoration to liberty. That he has been refused bail. That these motions are based upon the foregoing facts and upon said record on file in your Honorable Court in each of said causes, and on said Brief and Argument of appellant and plaintiff in error, on file therein. That the said Brief and Argument have been served upon and a copy delivered to the counsel for said appellees and said defendants in error.

WHEREFORE plaintiff in error and appellant respectfully presents to your Honorable Court these his motions, that said causes numbered as hereinbefore stated, to wit: No. 241, October Term, A. D. 1908, and No. 320, October Term, A. D. 1908, be by your Honorable Court ordered advanced to an early hearing and heard and determined together.

GEORGE D. COLLINS,
Counsel for Appellant and
for Plaintiff in Error

Dated January 18th, A. D. 1909, at the City of Washington, in the District of Columbia.

CERTIFICATE OF COUNSEL.

UNITED STATES OF AMERICA. } ss.

This is to certify that the undersigned, an attorney and counsellor-at-law of the Supreme Court of the United States, has carefully prepared and examined the foregoing motions, and that the matters therein set forth are well founded in fact and in law, and that the facts therein averred and therein recited, are true of his own knowledge.

GEORGE D. COLLINS,
Attorney and Counsellor-at-Law.

Dated January 18, A. D. 1909, at the City of Washington, District of Columbia.

IN THE SUPREME COURT OF THE UNITED STATES.

George D. Collins,
Plaintiff in Error,

vs.

Thos. F. O'Neil, the sheriff of the City and County of San Francisco, the People of the State of California, and the State of California,
Defendants in Error.

No. 241
October Term
A. D. 1908.

George D. Collins,
Appellant,

vs.

The Sheriff of the City and County of San Francisco, the People of the State of California and the State of California,
Appellees.

No. 320
October Term
A. D. 1908.

NOTICE OF MOTION.

NOTICE IS HEREBY GIVEN YOU that at a Supreme Court of the United States to be holden at the Capitol in the City of Washington, in the District of Columbia on Monday, the 18th day of January, A. D. 1909, at the opening of the court on that day, the plaintiff in error and the appellant, respectively, in the above entitled causes will present and submit to the said the Honorable the Supreme Court of the United States, his motions to advance said cases and each of them, to an early hearing to be heard and determined together. A copy of said motions is herewith served upon you, and the motions will

be made upon the facts and matters therein stated and for the reasons therein given, and set forth.

Respectfully,

GEORGE D. COLLINS,
Counsel for Appellant and for Plaintiff in Error.

To the said defendants in error and to the said appellees and their counsel, Hon. U. S. Webb, the attorney general of the State of California, and W. H. Langdon, Esq., the district attorney of the City and County of San Francisco, and William Hoff Cook, Esq., assistant district attorney of the City and County of San Francisco.

Dated December 16th, A. D. 1908.

IN THE SUPREME COURT OF THE UNITED STATES.

George D. Collins,
Appellant,
vs.
The Sheriff of the City and County of San Francisco, the People of the State of California and the State of California,
Appellees.
No. 320 October Term A. D. 1908.

George D. Collins,
Plaintiff in Error,
vs.
Thos. F. O'Neil, the sheriff of the City and County of San Francisco, the People of the State of California, and the State of California,
Defendants in Error.
No. 241 October Term A. D. 1908.

AFFIDAVIT OF SERVICE OF MOTION AND OF SERVICE OF NOTICE OF MOTION TO ADVANCE CASES, ETC.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

E. H. ORR, being duly sworn, deposes and says that she is now and for many years last past has been a citizen of the United States and a resident of the State of California. That she is a stenographer and as such has been in the employ of Mr. George D. Collins, attorney and counsellor-at-law, that on the 16th day of December, A. D. 1908, in the City and County of San Francisco, State of California, and at the request of Mr. Collins, she personally deposited in the United States mail, duly

postpaid, to wit: in the United States Post Office in said City and County of San Francisco, and mailed in sealed envelopes addressed severally to the following attorneys and counsel for the said appellees and defendants in error, to wit: Hon. U. S. Webb, attorney general of the State of California, and also in a sealed envelope addressed to W. H. Langdon, Esq., district attorney of the City and County of San Francisco, and also in a sealed envelope addressed to William Hoff Cook, Esq., assistant district attorney of the City and County of San Francisco, all of whom then and there were and are residents thereof, directed to each of them respectively, at their respective and proper office address in said City and County of San Francisco, with postage duly prepaid on each of said sealed envelopes and contents, a true copy of the motion dated January 18, A. D. 1909, and of the notice of said motion, which notice is dated December 16, A. D. 1908, to advance the above entitled causes to an early hearing and determination, to be heard and determined together by the Supreme Court of the United States. That each of said sealed envelopes, at the said time and place of the said mailing of the same contained a true copy of said motion and also of said notice of said motion. That each of said sealed envelopes, mailed as aforesaid and the said contents of each were as aforesaid, deposited by affiant in said mail to the said proper address of each of said attorneys and said counsel for said appellees and said defendants in error, duly postpaid, at such time as to reach each of said counsel by due course of mail, at least thirty days before the 18th day of

January, A. D. 1909, the date and time fixed in said notice of said motion. That a copy of the printed brief and argument of the appellant and plaintiff in error, on file in said causes above entitled has been served upon and delivered to said William Hoff Cook, Esq., of counsel for said appellees and defendants in error.

Subscribed and sworn to before me, this 16th day of December, A. D. 1908.

E. H. Orr.

Julius Calmann,
Notary Public in and for the City and County of San Francisco, State of California.

[NOTARIAL SEAL.]

Office Supreme Court, U. S.
FILED.
JAN 18 1909
JAMES H. McKENNEY,
CLERK.

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IN THE

SUPREME COURT OF THE UNITED STATES.

GEORGE D. COLLINS,
Plaintiff in Error,
vs.
THOMAS F. O'NEIL, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA,
Defendants in Error.

No. 241.
OCTOBER TERM, A. D. 1908.

Motion to Amend Writ of Error.

GEORGE D. COLLINS,
COUNSEL FOR PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

GEORGE D. COLLINS, *Plaintiff in Error,* *vs.* THOMAS F. O'NEIL, Sheriff of the City and County of San Francisco, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA, *Defendants in Error.*	No. 241. OCTOBER TERM, A. D. 1908.

Motion to Amend Writ of Error.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States and to the Court:

Comes now George D. Collins, the plaintiff in error in the above entitled cause, and presents to you this, his motion, that the writ of error therein be ordered amended by inserting in said writ and immediately preceding the signature of the clerk of the United States Circuit Court the *teste* required by law to wit: "Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 8th day of November, in the year of our Lord one thousand nine hundred and seven."

That said *teste* was inadvertently omitted from said writ of error. That said cause has now been pending in your Honorable Court for two terms and no motion nor notice of motion to dismiss the same has been made or given, but on the contrary, the defendants in error have consented that the case be advanced and heard in conjunction with cause No. 320, October term, A. D. 1908, also pending before you.

That said defect, to wit: said mistake in omitting said *teste* has not prejudiced and the amendment will not injure the defendants in error nor any of the defendants in error. This motion is made upon said writ of error and upon all the papers and the record on file in said cause, in your Honorable Court and upon the ground that said omission of said *teste* is a mistake that can properly be corrected and remedied by said amendment.

Revised Statutes United States, Section 1005.

Texas Pacific R. Co. v. *Kirk*, 111 U. S., 486

Wallon v. *Marietta Chair Company*, 157 U. S., 342, 345.

And the defendants in error cannot be heard to object.

McDonogh v. *Millandon*, 3 How. (U. S.), 693, 707.

Perhaps the writ of error is aided by the fact that the missing *teste* appears in the citation on the writ, issued the same day (Rec., p. 50; *McVeigh* v. *United States*, 8 Wall., 640). The *teste* was to be written in the writ of error by the clerk of the United States Circuit Court before issuing the writ, but through

inadvertence was omitted, and through further inadvertence the omission was not observed until the printed record was received on January 7, A. D. 1909. The omission of the clerk on whom the legal duty rests, cannot prejudice the plaintiff in error. (*Mutual L. Ins. Co.* v. *Phinney*, 178 U. S., 327.) The whole thing was an inadvertence, and curable as of course. (*Walton* v. *Marietta Chair Co.*, 157 U. S., 342, 345; *Texas R. Co.* v. *Kirk*, 111 U. S., 486.)

That said writ of error is in every respect except that stated herein, to wit: in respect to said *teste*, in strict conformity with the requirements of the law. That the proper return has been made to said writ of error and the transcript of the record annexed to said writ and duly certified has been filed herein and the cause is ready for hearing on its merits. That the defendants in error have duly appeared in answer to said writ of error.

Wherefore, said plaintiff in error prays that this motion be granted and said writ of error be ordered amended by the insertion therein of said *teste* as above indicated.

George D. Collins,
Counsel for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
DEC 7 1908
JAMES H. McKENNEY,
CLERK.

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IN THE

SUPREME COURT OF THE UNITED STATES.

GEORGE D. COLLINS,
Plaintiff in Error,
vs.
THOMAS F. O'NEIL, THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA,
Defendants in Error.

No. 241.
OCTOBER TERM, A. D. 1908.

No. 561.
OCTOBER TERM, A. D. 1907.

ON WRIT OF ERROR TO SUPREME COURT OF CALIFORNIA.

Brief and Argument of the Plaintiff in Error.

GEORGE D. COLLINS,
COUNSEL FOR THE PLAINTIFF IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

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IN THE

Supreme Court of the United States.

GEORGE D. COLLINS,
Appellant,
vs.
THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA,
Appellees.

No. 320. OCTOBER TERM, A. D. 1908.

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No. 667. OCTOBER TERM, A. D. 1907.

ON APPEAL FROM JUDGMENT OF UNITED STATES CIRCUIT COURT, DENYING HABEAS CORPUS.

GEORGE D. COLLINS,
Plaintiff in Error,
vs.
THOMAS F. O'NEIL, the Sheriff of the City and County of San Francisco, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA,
Defendants in Error.

No. 241. OCTOBER TERM, A. D. 1908.

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No. 561. OCTOBER TERM, A. D. 1907

ON WRIT OF ERROR TO SUPREME COURT OF CALIFORNIA

Brief and Argument of the Appellant and Plaintiff in Error.

STATEMENT OF CASE.

This is a case of international extradition, pursuant to the *treaty* between Great Britain and the United States. 1. The question is, can the prosecuting state, having received the custody and possession of the accused, in trust for the special purpose authorized and prescribed by the *treaty*, use and divert that custody and possession to an entirely different purpose, contrary to the trust, and instead of complying with the requirements of the treaty, substitute another and different prosecution on another and different charge? And if the prosecuting state can do this, then what becomes of the high obligations imposed by the supreme and exclusive authority of the extradition jurisdiction over the person of the accused, in order to insure the due execution of the *treaty?* And what becomes of the rights conferred upon the accused, by the treaty, and by Section 5275 of the Revised Statutes of the United States, particularly the rights supreme and paramount, to a trial to a final conclusion and within a reasonable time of the charge on which his extradition was granted, and this to the exclusion of every other and different charge? And what becomes of his right to return to the country of asylum, when acquitted on the charge upon which he was extradited, and of his right to an opportunity in due course, to obtain such acquittal?

And can the prosecuting state intercept the due

course of the extradition process, and by means of another and different prosecution on another and different charge, frustrate the extradition and nullify the requirements of both the treaty and the statute above cited?

2. If the accused is not brought to a trial to a final conclusion on the extradition charge, *within a reasonable time*, does this operate to terminate the extradition jurisdiction over his person, and entitle him to release on *habeas corpus*, and is an inexcusable and an indefensible failure, against his constant objection and protest, to give him such trial, for a period of now *three years* and more, sufficient in law to render his imprisonment unlawful, especially when by the law of the prosecuting state, an inexcusable delay for *sixty days*, renders void the indictment, and entitles the accused to his discharge on the writ of *habeas corpus?*

3. Is the sheriff authorized to hold in custody the accused, where the warrant of extradition does not run to him, nor in any manner permit him to exercise such authority, except by appointment of the United States, and he has not been so appointed?

These various questions in turn give rise to others of much importance; all the questions involved in the case are presented and discussed in this brief, and many authorities cited and quoted, all of them in point, and fully sustaining the propositions we urge and maintain in support of our right to liberty.

The appellant and plaintiff in error was extra-

dited from Canada, in the month of *October*, 1905, on an indictment charging perjury as having been committed by him on the 30th day of June, 1905, which indictment was found and filed in the Superior Court of San Francisco on the 13th day of July, 1905. He was brought to trial on this charge, in November, 1905, with the result that on December 22, 1905, the jury disagreed and were discharged. The case was then set down for trial on an early date in the following month; but before the date so set, arrived, and on *December* 29, 1905, another indictment, of course not within the extradition, was filed in the same court, charging him with perjury as having been committed on December 12, 1905, in testifying as a witness on the mistrial of the extradition case. He was then arrested *December* 29, 1905, upon this second indictment, and over his objection and protest expressly predicated upon the *treaty* and also on Section 5275 of the Revised Statutes of the United States, and upon the ground of a consequent want of jurisdiction of his person, *he insisting that the pre-existing extradition jurisdiction over him, was supreme and exclusive*, and entitled him to first be given a trial to a final conclusion of the charge on which he was extradited, and if acquitted, to return without detention to the country of asylum, he was forced by the state court to enter his plea of "not guilty", and to submit to trial on the second charge of perjury, *to the exclusion of the extradition case*, and after a very unfair trial, he was convicted on February 27, A. D. 1906, and on March 10, A. D. 1906, he was sentenced by the state court on the second indictment, to imprisonment in the penitentiary for fourteen years. At every step

in this extraordinary and manifestly unlawful proceeding, he firmly protested, and in that behalf, each time set up with much emphasis, and claimed the rights given him by the *treaty* and by Section 5275 of the Revised Statutes of the United States and by the well settled principle of international law prohibiting a trial on any charge *different* from the one on which the extradition was granted. The state court in every instance overruled this objection and protest. It is now more than *three years* since he was extradited, and he is still imprisoned without trial, under the warrant of extradition; and despite his demand made at the inception of the second prosecution in December, 1905, and repeatedly afterwards, that the extradition case be *first given a trial to a final conclusion,* the charge on which he was extradited, is still awaiting final trial. In fact, the second perjury charge has been virtually substituted by the state authorities for the extradition charge and the further prosecution of the latter has been discontinued and dropped, and this, as the record discloses, against the objection and protest of the accused, urged and explicitly based both upon the *treaty* and Section 5275 of the Revised Statutes of the United States.

The judgment and sentence on the second perjury charge have been affirmed by the state district court of appeal and are final, but, of course, manifestly null and void, as will be satisfactorily established in this brief, in the argument presented and by the numerous authorities we will be able to cite in support of our position. The appellant and plaintiff in error is now imprisoned by the sheriff of San

Francisco, representing the State of California, in the county jail, by virtue of no other authority than this void judgment, and as will also be established in this brief, the now legally defunct warrant of extradition, which as a matter of law, has become inoperative and void of authority, because the extradition case has not been brought to trial to a final conclusion *within a reasonable time or at all.* Nor has the sheriff any right, in any event, to hold him on the warrant of extradition, as it does not run to the sheriff, nor does it permit him to take the custody, except by special appointment of the United States, and he has never been so appointed. All the questions presented on both the appeal and writ of error, are distinctively and essentially *Federal* in their nature and origin, appertaining to a subject over which exclusive power and authority are vested by the constitution in the Government of the United States in right of its national sovereignty. On its merits, we rest our case upon the following fundamental, supreme and paramount rights derived from the *treaty*, from Section 5275 of the Revised Statutes of the United States and from international law, viz.:

1. The right to a trial to a final conclusion of the charge on which the extradition was granted, and to the exclusion of any and every different charge or prosecution, the extradition jurisdiction over the person of the accu[illegible] being supreme and exclusive by virtue of the *t[illegible]ty*, the supreme law of the land and by virtue of Section 5275 of the Revised Statutes of the United States.

2. The right of the accused to return to the country of asylum, on his acquittal of the extradition charge and his right to an opportunity to obtain such acquittal.

3. As essential to the rights mentioned, his right to a trial to a final conclusion, *within a reasonable time*, of the charge upon which he was extradited and herein to the exclusion of any trial or prosecution on any different charge.

4. The right of the accused, granted him by the *treaty*, to the judgment and decision of the country of asylum upon the evidence adduced, before he can be placed on trial or prosecuted on a charge of committing an offense of an extraditable character, subsequently to the extradition surrender and prior to the expiration of his right to return to the country of asylum. This prerogative of passing upon the evidence belongs exclusively to the sovereignty granting the asylum, and its purpose is to enable that country, in right of its sovereignty, to protect the asylum conferred and reserved to the accused against every trial or prosecution on any and every charge other than and different from the one upon which his extradition was granted. A trial or prosecution on a charge of committing an extraditable offense, subsequently to the extradition surrender, is only permissible when authorized by a *new* extradition, unless the accused fails to return to the country of asylum within the prescribed time; in which event he may be prosecuted on any charge whether of a prior or subsequent offense and whether extraditable or not. It is not within the power of the prosecuting state to cut off the right of asylum

nor destroy or impair the right of the accused to return free from detention, interference or molestation, to the country of asylum, either at once upon his final release on the extradition charge or within a reasonable time afterwards. With this right the prosecuting state cannot interfere by means of nor under the pretext or subterfuge of a subsequent prosecution on the charge of a subsequent offense. The value of the right of asylum consists in its actual enjoyment. To deprive the accused of the benefit of it when entitled, or to postpone his right to acquire its benefit, is to deny him the asylum conferred and reserved. So, too, postponing unnecessarily or unlawfully the final disposition of the extradition case, is depriving him *pro tanto* of the benefit of the right of asylum, and of the benefit of the right to return to the country of asylum; unnecessarily prolonging his imprisonment on the extradition charge is clearly in violation of his rights, and in violation of the *treaty* and of the statute. Unlawfully postponing the enjoyment of a legal right is tantamount to a corresponding denial and deprivation of the right. Hence the law of the *treaty* and of Section 5275 of the Revised Statutes of the United States requires that the extradition case be prosecuted with due diligence to a final conclusion, and to the exclusion of every charge other than the one designated in the warrant of extradition. The right to return to the country of asylum on acquittal in the extradition case, cannot be forfeited, if at all, until after it has vested; and besides this, there is no law declaring a forfeiture; and we have no bills of attainder nor *ex post facto*

laws. A right conferred by a supreme law, cannot be forfeited for violating a subordinate law. As said by Judge COOLEY, the accused is within the state by compulsion upon a single accusation; it is his right to have this disposed of and then to depart in peace. It would be monstrous to give the prosecuting state the power to say by means of a subsequent prosecution or by means of any other scheme it may devise, that the right of asylum and the right to return to the country of asylum, should be denied the accused. The *treaty* very properly makes the country of asylum, in right of its sovereignty, the only competent judge to decide from the evidence adduced, whether the accused shall be deprived of the right of asylum, upon a subsequent charge of committing an extraditable offense subsequently to his surrender in extradition, but prior to the expiration of his right to return.

It would be perfectly preposterous to confer this power on the state which had not granted the asylum, and which in fact is always antagonistic to the "right of asylum." It is an unheard of thing, that the sovereign right of asylum exists merely at the will, toleration or mercy of an opposing state, prosecuting the accused in defiance of its protection, and perhaps for the very purpose of preventing him from returning to the country from whose asylum and protection he had been forcibly taken on extradition, but on condition imposed that the receiving state should allow him to return free from all detention or molestation, on his final release upon the charge on which he had been extradited; and to this end, that he should be given a trial to a final con-

clusion and with due diligence, upon the extradition charge, to the exclusion of every different charge.

So it will be seen that all the principles and doctrines of the law upon the subject of trial and prosecution of the accused by the receiving state have but one ultimate purpose, and that purpose the protection and the conservation of the sovereign right of asylum as guaranteed by the *treaty,* in abridging it only to the extent of the special extradition, and by fiction of law, deeming the accused as against every charge and prosecution other than as authorized by the particular extradition, to still remain in the territory of the country of asylum and within the protection of its laws, thus making it necessary that there be a *new* extradition before he can be placed on trial or prosecuted on a charge of committing an extraditable offense, subsequently to the extradition surrender and prior to the expiration of his right to return to the asylum reserved to him by the *treaty.*

If, of course, he fails to return within the prescribed limit of time, he is considered to voluntarily abandon the asylum he had acquired, and may then be prosecuted on any charge.

It is the well settled doctrine of the law that an extradition treaty is in its essential nature, simply a limitation for a special purpose, of the right of asylum; and that as against every trial and every prosecution not authorized by the particular extradition, the asylum obtained by the accused, still persists and still continues, thus making the extradition jurisdiction in the case where it exists, supreme and exclusive over the person of the accused, and pro-

hibiting the exercise of any other jurisdiction over him, upon any other and different charge than the one upon which his extradition was granted.

In the concrete this means that no "extradited person" can without his consent be placed on trial nor prosecuted on any different criminal charge, except by the special authority of an extradition pursuant to the terms and conditions of the *treaty*, where he has not waived his right to return to the country of asylum; he certainly cannot forfeit it, for the law places him in the territory of the sovereignty granting the asylum, as against every trial and prosecution on any other and different charge; and, besides this, there is no law declaring a forfeiture. The extradition jurisdiction exists solely for the purpose of carrying out and executing the requirements of the *treaty*, the supreme law of the land, and the provisions of Section 5275 of the Revised Statutes of the United States.

In its very nature and purpose it excludes every jurisdiction over the person of the accused essential to his trial and prosecution on another and different charge, while the extradition case is pending and awaiting trial to a final conclusion. This very important and decisive point as to the supreme and exclusive nature of the extradition jurisdiction was disposed of by both the State Supreme Court and the Federal Circuit Court, *by simply ignoring it*, and deciding the case in entire disregard of it, and without the slighest reference to it. Nothing the lower courts say in the opinion filed responds as much as remotely, nor has the slightest relevancy to the very controlling point suggested, although, as shown by

the record in each case, it was both raised and urged with much emphasis. It is a point absolutely unanswerable, and meets most conclusively every reason and argument advanced in the opinion of the State Supreme Court and in the concurring opinion of the Federal Circuit Court. It was absolutely impossible for the State Superior Court to acquire jurisdiction over the person of the accused, on the second perjury charge, while the preceding extradition jurisdiction over his person persisted and continued in the full supremacy of its exclusive control and authority conferred by the *treaty*, the supreme law of the land, and existing for the sole and only purpose of executing the treaty.

I.

HOW THE QUESTIONS INVOLVED ARE RAISED.

The case comes before the Supreme Court of the United States, on an *appeal* duly allowed, from the judgment of the United States Circuit Court, Northern District of California, refusing to grant the appellant the writ of *habeas corpus*, and on a *writ of error* to the Supreme Court of California, directed against the judgment of that court, remanding the plaintiff in error to the imprisonment complained of, after granting and issuing the writ of *habeas corpus*, taking some five months to decide the case.

On the *appeal*, the case is presented on the petition or complaint for *habeas corpus*, the rule *nisi* issued by the Circuit Court, the return made in answer to the rule, and a bill of exceptions presenting the facts (*there was no evidence offered to support*

the answer and return); and certain rulings to which exception was reserved; also the decision and judgment of the *court*, refusing to grant *habeas corpus* and the assignment of errors printed in the record, which is hereby specially referred to and made part of this brief as fully as though set forth herein; also the specification of errors, and the prayer for reversal of the judgment. On the *writ of error* the case is presented on the petition for *habeas corpus*, the writ of *habeas corpus*, the return to the latter writ, the exceptions to the sufficiency of the return, raising simply questions of law, the decision overruling the exceptions, the answer or traverse to the return, the judgment as well as the opinion with its special finding of facts, remanding the plaintiff in error to the imprisonment complained of, and the assignment of errors, printed in the record, which is hereby specially referred to and made part of this brief as fully as though set forth herein; also the specifications of errors, and the prayer for the reversal of the judgment. A thorough review of the decision and opinion of the State Supreme Court and of the Federal Circuit Court will be found at page 128, and following of this brief. All the federal questions in this brief presented were raised and decided, and the record so shows.

II.

SPECIFICATION OF ERRORS.

1. On the appeal from the judgment of the United States Circuit Court we specify the following errors:

The court erred in refusing to grant the appellant the writ of *habeas corpus.*

The court erred in refusing to discharge the appellant on *habeas corpus* from the imprisonment complained of.

The court erred in ruling that the appellant was not entitled to the remedy of *habeas corpus* issuing out of and under the seal of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

The court erred in deciding that the appellant is not unlawfully imprisoned in violation of the treaty of extradition between the United States and Great Britain, to wit: the treaty of 1842 and the subsequent convention of 1889.

The court erred in deciding that the appellant is not unlawfully imprisoned in violation of Section 5275 of the Revised Statutes of the United States.

The court erred in deciding that the appellant is not unlawfully imprisoned in violation of international law.

The court erred in deciding that the appellant is not entitled to his release on *habeas corpus* issuing out of and under the seal of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California, from the imprisonment under the trial, conviction, judgment and sentence of the Superior Court of San Francisco, on the second perjury charge.

The court erred in deciding that the appellant is not entitled to his release on *habeas corpus* issuing out of and under the seal of the United States Cir-

cuit Court, Ninth Judicial Circuit, Northern District of California, from the imprisonment under the warrant of extradition and the Superior Court bench warrant.

The court erred in deciding that the appellant is not unlawfully imprisoned in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and in deciding in that respect that he is not by the State of California deprived of his liberty without due process of law, and in further deciding that he is not by the State of California in his imprisonment and by reason of his imprisonment, denied the equal protection of the law.

The court erred in deciding that the arrest, trial, prosecution, conviction, judgment and sentence of the appellant in the Superior Court of San Francisco, on the second perjury charge, are not unlawful and void, and in violation of the said treaty of extradition of 1842, between Great Britain and the United States and of the convention of 1889.

The court erred in deciding that the imprisonment of appellant, under the warrant of extradition, is not unlawful.

The court erred in deciding that his imprisonment by the sheriff of San Francisco, under the warrant of extradition, is not unlawful.

The court erred in deciding that the arrest, trial, conviction, sentence and judgment of appellant in the Superior Court of San Francisco, on the second perjury charge, are not unlawful and void and in violation of Section 5275 of the Revised Statutes of

the United States, and also erred in deciding they are not in violation of international law.

The court erred in deciding that the said arrest, trial, conviction, sentence and judgment of appellant in the Superior Court of San Francisco are not unlawful and void, and in violation of the rights conferred on him by the treaty of extradition between Great Britain and the United States, by Section 5275 of the Revised Statutes of the United States and by international law.

The court erred in deciding that the warrant of extradition had not become inoperative and void of authority by reason of the failure to bring the extradition case to trial, to a final conclusion, within a reasonable time.

The court erred in deciding that the appellant is not entitled to his liberty on *habeas corpus*, for the purpose of returning to the country of asylum.

The court erred in deciding that the extradition case had been brought to trial, to a final conclusion, within a reasonable time.

That the court erred in deciding that the appellant, or any other person extradited pursuant to the treaty between Great Britain and the United States, upon a specific and described charge of perjury, can be legally arrested, placed on trial, convicted and sentenced upon another and different charge of perjury, and also in deciding that this can be legally done while the extradition case is pending and awaiting trial to a final conclusion, and while the accused is held under the warrant of extradition and while he is held under the supreme

and exclusive authority of the extradition jurisdiction, pursuant to the treaty.

The court erred in refusing to permit the appellant to prove "that the United States never appointed nor designated any person or persons and never appointed nor designated the sheriff of the city and county of San Francisco to receive the custody of the petitioner from Thomas Gibson, the person designated in the warrant of extradition, and never directed said Gibson to deliver or surrender said petitioner to the sheriff of the city and county of San Francisco." (Rec., 20.)

The court erred in ruling out the proof offered by appellant to show "that without his consent and against his will and without the consent of the United States or of Great Britain he was by the State of California removed from the custody of the agent of the United States designated in the warrant of extradition, to wit, Thomas Gibson, and placed in the custody of the sheriff of the city and county of San Francisco, where he has been held and imprisoned ever since." (Rec., 20.)

The court erred in denying and dismissing the petition for *habeas corpus* and in refusing to grant the writ of *habeas corpus*. It should be explained that the case referred to in the return to the rule *nisi* (Rec., 8), is the case cited in the opinion (Rec., 19) and reported in 154 Fed. Rep., 980. It was *after* following out the requirements and conditions stated in the opinion reported in 154 Fed. Rep., 980, in respect to exhausting all remedies provided by the state, that appellant then having first done this, filed and presented the petition and complaint for

habeas corpus involved in this appeal. There is no point possible as to the previous decision being *res adjudicata;* of course, it is elementary that it is not. There was no decision on the *merits.* Nor is it pleaded as being *res adjudicata.* Besides, the facts are not the same in all respects.

2. On the writ of error to the Supreme Court of the State of California we specify the following errors:

The court erred in overruling the exceptions filed and presented by plaintiff in error, to the sufficiency in law, of the return made by the sheriff of San Francisco and by the State of California to the writ of *habeas corpus* theretofore granted and issued by said court.

The court erred in deciding that plaintiff in error is not unlawfully imprisoned in violation of the treaty of extradition of 1842, nor of the subsequent convention of 1889, between Great Britain and the United States.

The court erred in deciding that plaintiff in error is not unlawfully imprisoned in violation of Section 5275 of the Revised Statutes of the United States, and erred in deciding that he is not imprisoned in violation of international law.

The court erred in deciding that plaintiff in error is not unlawfully imprisoned in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and not deprived by the State of California of his liberty without due process of law, and not denied by the State of California the equal protection of the law.

The court erred in deciding that the arrest, trial, conviction, judgment and sentence of plaintiff in error on the second perjury charge, in the Superior Court of San Francisco, are not unlawful and void and in violation of the said treaty of extradition between the United States and Great Britain.

That the court erred in deciding that the arrest, trial, conviction, judgment and sentence of plaintiff in error, on the second perjury charge, in the Superior Court of San Francisco, are not unlawful and void and in violation of Section 5275 of the Revised Statutes of the United States, and in deciding they are not in violation of international law.

The court erred in deciding that the arrest, trial, conviction, judgment and sentence, on the second perjury charge, in the Superior Court of San Francisco, are not unlawful and void and in violation of the rights conferred on plaintiff in error by the said treaty of extradition between Great Britain and the United States, by Section 5275 of the Revised Statutes of the United States, by international law and by the warrant of extradition.

That the court erred in deciding that the said arrest, trial, conviction, judgment and sentence of the plaintiff in error, in the Superior Court of San Francisco, are not unlawful and void for want of jurisdiction over his person.

That the court erred in deciding that the said arrest, trial, conviction, judgment and sentence of the plaintiff in error, in the Superior Court of San Francisco, are not unlawful and void and in violation of the extradition jurisdiction over his person.

That the court erred in deciding that the imprisonment of plaintiff in error, under the warrant of extradition and under the Superior Court bench warrant is not unlawful.

That the court erred in deciding that the imprisonment of the plaintiff in error by the sheriff of San Francisco, under the warrant of extradition, is not unlawful.

The court erred in deciding that the warrant of extradition did not cease to be operative and effective, and become void of authority, by reason of the failure to bring the extradition case to trial, to a final conclusion, within a reasonable time.

The court erred in deciding that the extradition case was brought to trial, to a final conclusion, within a reasonable time.

The court erred in deciding that the plaintiff in error is not entitled to his liberty on *habeas corpus* to return to the country of asylum.

The court erred in deciding that the plaintiff in error is not entitled to his discharge from the imprisonment complained of, and upon the writ of *habeas corpus.*

The court erred in deciding that plaintiff in error did not prove that the extradition case was not brought to trial to a final conclusion within a reasonable time.

The court erred in remanding plaintiff in error to the custody of and to the imprisonment by the sheriff of San Francisco, to be by him held on process in the case where the conviction, sentence and judgment had been rendered against plaintiff in error by the Superior Court of San Francisco.

The court erred in remanding plaintiff in error to the custody of and to the imprisonment by the sheriff of San Francisco upon the warrant of extradition, and upon the bench warrant of the said Superior Court, and in refusing to release and discharge plaintiff in error and restore him to his liberty on the writ of *habeas corpus*.

That the court erred in deciding that plaintiff in error is properly and lawfully in custody of the sheriff of San Francisco, upon the judgment of conviction and sentence of the Superior Court of San Francisco, and erred in deciding that the same are not null and void for want of jurisdiction over his person, and in deciding that the same are not null and void because in contravention of the extradition jurisdiction; also in deciding that the same are not null and void because in contravention of the treaty of extradition between Great Britain and the United States; also in deciding that the same are not null and void because in violation of Section 5275 of the Revised Statutes of the United States; also in deciding that the same are not null and void because in violation of international law, and also in deciding that the same are not null and void because in violation of the rights conferred on him by said treaty and by said Section 5275 of the Revised Statutes and by international law.

That said Supreme Court of California erred in deciding that the plaintiff in error is properly in the custody of the sheriff of San Francisco, on the bench warrant of the Superior Court and the extradition proceedings thereon.

That the court erred in deciding that the plain-

tiff in error is not entitled to his release on *habeas corpus* from the imprisonment under the conviction, sentence and judgment of the Superior Court of San Francisco, on the second perjury charge.

That the court erred in deciding that the plaintiff in error is not entitled to his release on *habeas corpus*, from the imprisonment under the bench warrant of said Superior Court, in the extradition case, and also erred in deciding that he is not entitled to his release on *habeas corpus* from the imprisonment under the warrant of extradition.

That the court erred in deciding that the plaintiff in error or any other person extradited pursuant to the treaty between Great Britain and the United States upon a specific and described charge of perjury, can be legally arrested, placed upon trial, convicted and sentenced upon another and different charge of perjury, and also in deciding that this can be legally done while the extradition case is pending and awaiting trial to a final conclusion, and while the accused is held under the warrant of extradition, and while he is held under the supreme and exclusive authority of the extradition jurisdiction, pursuant to the *treaty*.

III.

SUMMARY OF THE LAW DETERMINATIVE OF THE QUESTIONS RAISED.

The law by which the questions presented are to be determined, may by way of preface be here summarized, simply for the purpose of indicating with some greater clearness of description, the character

and the extent of the points raised. The complete, and we trust, the satisfactory discussion of the law, together with the citing of the authorities amply sustaining these points, and amply sustaining our claim that we are illegally imprisoned in violation of the *treaty* and of Section 5275 of the Revised Statutes of the United States, will in the orderly course, with the exception of one or two of the points, sufficiently presented in this summary, be found in that part of this brief, entitled "Further Argument on Main Propositions. Fundamental Principles of the Law of Extradition," and the succeeding chapters of the brief. We, at this time, for the purpose stated, offer the following summary, feeling sure that it will serve to induce a clearer and more comprehensive view of the case, and of the important questions raised, as well as of the law which must control their decision.

1. The treaty of extradition of 1842, between Great Britain and the United States, known as the "Ashburton Treaty." Also the supplementary convention of 1889. The sixth article of the Constitution of the United States, declaring the treaty to be "the supreme law of the land." It will be fully established in this brief that Article 3 of the convention of 1889, has no possible application in law, in reason nor in logic, to any of the questions we present, and gives rise to no pertinent inference or deduction in relation to any of the questions raised. It should not be permitted to mislead into erroneous and superficial impressions.

2. Section 5275 of the Revised Statutes of the United States, brought forward from the Act of

Congress of March 3rd, 1869, entitled "An Act Further to Provide for Giving Effect to Treaty Stipulations Between This and Foreign Governments for the Extradition of Criminals." (15 Stat. at Large, U. S., 337.) The sixth article of the Constitution of the United States declaring such statute to be "the supreme law of the land."

3. The well established principle of international law, incorporated both in the treaty and in Section 5275 of the Revised Statutes of the United States, that a person extradited pursuant to a *treaty*, has the legal and supreme right to a trial to a final conclusion of the charge on which his extradition was granted; and this, necessarily in priority over, and to the exclusion of any and every different charge, irrespective of whether such other charge be that of an offense committed subsequently to the extradition surrender or not.

No jurisdiction can be acquired over the person of the accused on a subsequent prosecution for an alleged subsequent offense, nor to put him on trial, nor to render judgment thereon, while he is held under the supreme authority of the warrant of extradition, and of the extradition jurisdiction, for the purpose of enforcing and carrying into execution the provisions of the *treaty*, the supreme law of the land. There can be but one supreme law; in its presence all other laws must yield their power and authority. It is a maxim of jurisprudence, that *In praesentia majoris cessat potentia minoris.* There can be no jurisdiction over the person, without a law conferring it. If there are two "laws" purporting to confer jurisdiction, and over the same per-

son, one of these laws supreme, the other not, *there is but one jurisdiction, and that the jurisdiction of the supreme law.* The scope of its authority is an entirety, and indivisible, for supremacy is necessarily entire and omnipotent within the sphere of its legitimate control. To permit an inferior law to exert authority in dominion over the subject assigned to the control of the supreme law, is to subvert the supreme law, and invade the domain of its exclusive jurisdiction. We say its "exclusive jurisdiction," for if it is concurrent or subordinate, then the law is not and cannot be supreme. Even a concurrent jurisdiction becomes exclusive when it is the first to become vested either over the person or the subject matter. The jurisdiction over a person extradited pursuant to *treaty*, is in its every aspect and operation, necessarily *sui generis*, and is not the ordinary or local jurisdiction which the prosecuting state possesses in the usual administration of its local criminal law. The extradition, it must be understood, is not merely the matter of a transfer of the accused from one state to another, then ceasing its power and protection, and releasing its requirements, the instant he comes within the territory of the latter, thus surrendering and leaving him to the same absolute control of the prosecuting state for the purpose of any criminal prosecution it may desire, as is vested in it over every person within its territory, not officially privileged and who has not been the subject of a treaty extradition. On the contrary, the jurisdiction of the extradition with all its requirements, restrictions and restraints, extends over the accused, until the final termination of the extradition

case and for a reasonable time afterwards, and affording him a reasonable opportunity after his final release from custody or imprisonment on the extradition charge, to return to the country of asylum, free from all interference, interruption, detention and molestation, no matter from what source it may come. In the language of Judge COOLEY, adopted by the Supreme Court of the United States in the Cosgrove case, "He is within the state by compulsion of law" (and that the law of the treaty), "upon a single accusation. He has a right to have that disposed of, and then to depart in peace." The extradition takes his custody while he is in the power of a sovereignty, to whose territory the criminal laws of the prosecuting state cannot extend; and for a specially limited and precisely defined purpose, prescribed by the *treaty,* continues and perpetuates its supreme and necessarily exclusive authority and control over his person, in the territory of the prosecuting state, and throughout the prosecution of the case, until its final termination, and thereafter until the accused has been given a reasonable time and opportunity to return to the country of asylum. To prosecute him and place him on trial on another charge while the extradition case is pending and awaiting trial to a final conclusion, would clearly be repugnant to and an invasion of the exclusive jurisdiction over his person, held by virtue of the *supreme* authority of the warrant of extradition, in execution of the treaty. And this is manifestly and emphatically true, in a case where the collateral trial and prosecution are upon a subsequent charge of committing an extraditable offense subsequently to the extradition sur-

render. It is as fully and completely an invasion and violation of the pre-existing extradition jurisdiction as if it were a prosecution on a subsequent charge of committing an extraditable offense prior to the surrender. One is manifestly just as much an infringement of the jurisdiction created by the *treaty* as is the other. There is a difference it is true, between prior and subsequent offenses, but obviously not in this particular,—not in respect to a trial and prosecution while the extradition case is pending and while the extradition jurisdiction persists and continues in the supremacy of its exclusive control and authority over the person of the accused for the purpose of carrying into execution the necessarily *paramount* requirements of the treaty. The difference that does exist between prior and subsequent offenses is very extensively discussed in other parts of this brief, especially in relation to the meaning of Article 3 in the convention of 1889;—it being permissible to prosecute subsequent offenses extraditable in character, upon a new extradition, but never permissible to prosecute prior offenses unless the accused waives his rights.

4. The law prohibits, the *treaty* prohibits the arrest, the trial, the prosecution and conviction of an extradited person upon any charge, whatsoever, *different* from that upon which his extradition was granted. There is no exception in favor of subsequent offenses. The purpose of this prohibition is two-fold: first, to enforce the supreme right vested in the accused by the *treaty* and by Section 5275 of the Revised Statutes of the United States, to a trial to a final conclusion, and within a reasonable

time after the surrender, of the specific charge on which his extradition had been granted; and secondly, to conserve and enforce, and make available, and protect from all interference, impairment and obstruction, as well as postponement, by the means of a subsequent prosecution on a different charge, not only the extradition jurisdiction, but the right of the accused to return to the country of asylum. For these several reasons, the prohibition referred to is manifestly very strongly applicable to an arrest, trial, prosecution and conviction on a subsequent charge of an offense alleged to be subsequently committed.

5. An extraditable offense committed after extradition, and before the termination of the extradition case, can only be prosecuted upon and by virtue of the authority of a *new* extradition, unless the accused waives his right to return to the country of asylum within the time limited. It is the well settled doctrine of the law that against a person who has sought and obtained an asylum in a foreign country, there can be no criminal prosecution in the state from which he departed, except it be by and pursuant to the special authority of the treaty of extradition, while he remains within the protection of the laws of the country of asylum. Further, that when he is extradited pursuant to the *treaty*, it is only for the special and limited purpose of giving him a trial to a final conclusion, upon the specific charge on which his extradition was granted; and that as against all other prosecutions and against any trial or conviction on a charge of committing an offense subsequently to the extradition surren-

der and prior to the expiration of his right to return to the country of asylum, *the law deems his person to be still within the territory of the country of asylum.* If he returns thereto, within the prescribed period, he is granted absolute immunity as to all offenses committed prior to the extradition surrender, as well as to all non-extraditable offenses committed subsequently; but as to any extraditable offense committed after the extradition surrender, he can be prosecuted, but only upon the authority of a *new* extradition.

If he does not return to the country of asylum within the prescribed time, he waives the protection of the right of asylum, and can legally be prosecuted without further extradition, upon any charge, prior or subsequent, extraditable or not. Of course it is not permissible for the *prosecuting state* to deprive the accused of his supreme right to return to the country of asylum, nor to deprive the sovereignty of the country of asylum, of the power granted in the *treaty* to determine in the first instance and as to *every* extraditable charge, whether the evidence adduced is sufficient to justify a withdrawal of the asylum conferred, or to justify a modification or abridgment of the right of asylum to the extent of the charge made as to the subsequent but extraditable offense; we say it is not competent for the prosecuting state to accomplish any such deprivation of right or destruction of sovereign power, by seizing and arresting the accused while he is under the protection of the extradition jurisdiction, and in violation of every obligation imposed by the *treaty* and by Section 5275 of the Revised

Statutes of the United States, forthwith discontinue the prosecution of the extradition case, and in lieu thereof, place the accused on trial, prosecute and convict him, without authority of a *new* extradition, on the altogether different charge of committing an extraditable offense subsequently to the extradition surrender, thereby cutting off the right of asylum and the right to return to the country of asylum, doing this without the consent of the sovereignty which had granted it, and modified or abridged it only to the specially limited extent of the preceding extradition, *reserving* it for the benefit of the accused, against his arrest, or trial, or prosecution on *all* other charges, at least until again modified or relinquished by another extradition pursuant to the *treaty*, unless he has voluntarily waived his rights and abandoned the asylum reserved for him. To confer on the prosecuting state the power to cut off and destroy the right of asylum, perhaps under pretext and subterfuge of a prosecution for, or merely a charge and nothing more than a charge of an alleged subsequent offense, perhaps a charge or offense simulated and fabricated for the very purpose, would manifestly be monstrous in the extreme. Whether or not the subsequent extraditable offense has been committed, or whether there is *prima facie* evidence of its commission, is a question which rightly and under the treaty itself, must be passed upon and determined in the first instance exclusively by the country of asylum; for otherwise, it would be within the power more or less arbitrary of the state antagonistic to the asylum conferred, to defeat the "sovereign right of asylum," and the

right of the accused to return to the country of asylum, by merely resorting to the pretext or subterfuge of a charge or prosecution on an alleged subsequent offense; and if the accused was acquitted on the latter, the violation, interruption and impairment of his right to return and of the rights of asylum, by his detention on the subsequent charge, would be without remedy; and if he was wrongfully convicted, *and as in this very case, convicted contrary to both the law and the evidence*, and denied all relief in the state courts, he would have no redress for the loss and destruction of the supreme rights given him by the *treaty* and by Section 5275 of the Revised Statutes of the United States, nor would the foreign nation whose sovereignty alone conferred and reserved "the right of asylum," abridging it only to the extent of the particular extradition, have any remedy for its destruction in the case supposed. If the paramount right of the accused to a trial to a final conclusion of the specific charge on which he had been extradited, and if his equally paramount right to return to the country of asylum on his acquittal of that charge, had been recognized and respected by the prosecuting state, and thereafter his extradition had been sought for the alleged subsequent offense, it being extraditable, we have not the slightest doubt and for the special reasons hereafter given in this brief, that the country of asylum after hearing and considering the evidence, would promptly decide *that it was entirely insufficient*, and refuse the further extradition of the accused. Now this is the protection of "the sover-

eign right of asylum," and the treaty secures it to the accused. It is not exhausted and extinguished on the first extradition, for that is special and limited, leaving the accused by fiction of law, still within the protection or territory of asylum, against arrest, or trial, or prosecution on *all* other charges, extraditable or not, committed before or after the extradition surrender, with the condition subsequent, however, that he must actually return to the country of asylum within the time limited, or he waives the protection of the right of asylum. It cannot be possible that the *treaty* is so absurd and self-stultifying as to put it within what is practically the exclusive and absolute power of the state opposed to the asylum, to say by means of a subsequent prosecution for an alleged subsequent offense, or by any other scheme, whether the right of asylum and the right to return to the country of asylum, shall or shall not be available to the accused. It must be borne in mind that the asylum and right of asylum pertain alone to the sovereignty of the foreign nation,—the nation conferring the right on the accused, and reserving it to him against every charge and prosecution not within the scope of the particular extradition; and no other nation, and surely not a state that is not sovereign and is no nation, can be permitted to determine whether the asylum of the foreign power shall or shall not be maintained and perpetuated in favor of the accused, nor decide adversely to it by detaining him on another extraditable charge, and then determine the question for the sovereignty of the country of asylum, the latter the only authority, according to

the *treaty*, competent to decide it. This can no more be done by means of a subsequent prosecution on the charge of committing a subsequent offense, than it can be done in any other manner that may be supposed. Where there is a treaty of extradition, and pursuant to its terms, a person is extradited on a specific charge, there exists and there continues to exist in right of the sovereignty granting the extradition, an asylum from which he has been taken; and there is vested in him the paramount right to return to the protection of the country of asylum, without interruption, detention, interference or molestation (no matter what the source), on his acquittal or other final termination of the extradition cases, in his favor. He may return at once or within a reasonable time. It would manifestly be an interference with, and an obstruction as well as an infringement of this right, and of the paramount right to a trial and to an opportunity of procuring an acquittal in the extradition case, to intercept its due and regular course, in its orderly progress to a trial to a final conclusion, by arresting the accused in violation of the supreme authority of the warrant of extradition, and by placing him on trial, and prosecuting him to a final conclusion, to conviction and sentence on the altogether different charge of committing a subsequent offense, to say nothing of the flagrant violation of the fundamental and supreme right derived from the *treaty*, to a trial of the charge on which he was extradited, before being subjected to any other trial or prosecution on any other and different charge.

6. By the implied requirement of the *treaty*, and

of Section 5275 of the Revised Statutes of the United States, and by international law, the accused must be brought to trial to a final conclusion on the charge specified in the extradition proceedings, *within a reasonable time*, or jurisdiction over his person ceases to exist, and the warrant of extradition is in law no longer authority for his detention in custody. This doctrine of the law is indispensable for the protection and enforcement of the right to return to the country of asylum, and to maintain in its integrity against encroachment and impairment, the reserved "right of asylum," constructively extended to the accused by fiction of law, against his arrest, trial, prosecution and conviction on any and every charge extraditable in character, alleging the subsequent commission of a subsequent offense and one within the treaty enumeration. What is a reasonable time will usually be determined by analogy, more or less persuasive, to the *lex fori*, in this case the law of the State of California. According to the law of that state, as declared by the decision of its Supreme Court in the *habeas corpus* case of *Ex parte Begerow*, 133 Cal.. 349, the period of sixty days is the limitation prescribed, and as held in that case, this period of limitation applies as fully to a case where the jury have disagreed, as it does to one that never has been brought to trial at all. The value of the right of the accused consists in the benefit it confers. To unnecessarily postpone the benefit of the right is to *pro tanto* deny it, if the postponement is made beyond the period reasonably necessary to bring the extradition case *to trial to a final conclusion*. This is self-evident. Perhaps an unnecessary postponement for a week or ten days

would be winked at; but in principle it is vicious and should not be tolerated. Says Mr. Justice Bradley, speaking for the court in *Boyd* v. *United States*, 116 U. S., 635:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be '*obsta principiis.*'"

This is strongly applicable to rights of an accused person, conferred upon him by a treaty of extradition. It is the law of California, as laid down in the *Begerow case*, and on constitutional grounds, that when the accused is not brought to trial within sixty days after the disagreement of the jury, the indictment becomes *void*, and the jurisdiction over his person is at an end; further, that he is entitled to his discharge on *habeas corpus*. If there is good cause for the delay, it is held in the same case, to be incumbent on the state to establish it *affirmatively* on the record. There is no such showing in this case, nor could there be, for, as established most positively by the record, the state unlawfully substituted the second charge of perjury for the extradition charge, and on the second charge brought the

accused to trial, within the sixty days after the jury had disagreed in the extradition case; and surely this proves that the latter case, the extradition case, could have been brought to trial within the same period if the prosecution of it had not been unlawfully *discontinued*, and the second charge of perjury unlawfully substituted for it. We certainly do not see how we could justly or reasonably be expected to furnish any further proof than this; and we are at a loss to understand why the Supreme Court of California states in its opinion that we furnished no evidence on the subject, when, as shown clearly by the record, the facts above adverted to, appear affirmatively in the case, and appeared as is disclosed by the record, at the time the opinion of the court was prepared, *and are stated in that very opinion.* If there was any reasonable or good cause for the delay in prosecuting the extradition case to trial to a final conclusion, it was incumbent on the state to establish it affirmatively on the record.

> "It is enough," say the court in the *Begerow case*, "for the defendant to show that the time fixed by the statute had expired, and that the case had not been postponed on his application. If there was any good cause for holding him for a longer time without a trial, it was for the prosecution to show it." (*Ex parte Begerow*, 133 Cal., 349.)

And the court ordered the prisoner discharged on *habeas corpus*, because he had not been brought to trial within sixty days *after the disagreement of the jury.* The case involved a charge of murder, and the opinion of the court by Mr. Justice Temple is a very learned and exhaustive review of the law, on

constitutional grounds. Mr. Hughes in his work on Criminal Law and Procedure, at Section 2567, says:

> "Where the prosecution holds and continues a cause beyond the statutory limit against the objection of the defendant, the indictment becomes null and void, and the defendant is consequently entitled to be discharged."

Such, too, is the view of Hawley in his work on International Extradition, page 12, where he says that unreasonable delay in the prosecution gives the accused the right to his discharge. There manifestly was *no jurisdiction* to arrest or try the accused on the second perjury charge, within sixty days after the disagreement of the jury in the extradition case, and, therefore, the subsequent conviction and sentence upon the unauthorized trial, are null and void, for want of jurisdiction over the person of the accused, on the second perjury charge. There can be no possible excuse offered by the State of California for the failure to try the accused on the extradition charge, for *three years* and more, to a final conclusion, unless it be that he has been prosecuted, convicted and sentenced on the substituted charge; but manifestly that is no excuse. To keep an extradited person imprisoned for years in defiance of his constant protest, without trial to a final conclusion of the charge on which his extradition was granted, is not only a flagrant violation of the *treaty* and of Section 5275 of the Revised Statutes of the United States, but is clearly the very extreme of governmental oppression. No such arbitrary and despotic power resides in any official or department of the state or of the United States. As very convincingly shown in the able opinion of Mr. Justice Temple,

speaking for the court, in *Ex parte Begerow,* 133 Cal., 349, to unreasonably delay the trial of an accused person, is a palpable violation of Magna Charta, and *habeas corpus* is the proper remedy to secure him his liberty in such a case.

7. By the terms of the convention of 1889, in Article 6, the extradition is to be "carried out" according to the laws in force in the surrendering state. Both Canada and Great Britain require that the warrant of extradition (the sole and supreme authority for the custody of the accused), shall direct that the agent of the United States receiving the accused, "convey him within the jurisdiction of the United States and there place him in the custody of any person or persons appointed by the said United States to receive him, for which this shall be your warrant." And the copy of the warrant appearing in the record so reads. *The sheriff of San Francisco was never so appointed;* consequently the warrant of extradition appearing in the record gives him no right to the custody of appellant and plaintiff in error, even assuming that the warrant is not legally devoid of further authority by reason of the failure to give the accused a trial to a final conclusion within a reasonable time, on the extradition charge. Whatever the efficacy and authority of the extradition warrant as process controlling the jurisdiction over the person, it is of necessity paramount to and supreme over all process emanating from the State of California, and controls and is the sole and only authority recognized by law, for the imprisonment of the accused, while it remains in full force and effect. As correctly said by Judge Benedict:

> "The person of the prisoner is not within the jurisdiction of the United States by virtue of any warrant issued out of this or any court. The prisoner was brought within the jurisdiction of the United States by virtue of a warrant of the executive authority of a foreign government, upon the requisition of the executive department of the government of the United States." (*United States* v. *Caldwell*, 8 Blatchf., 133.)

It is, of course, a warrant of such high and comprehensive authority that it continues to control the *jurisdiction* over the person of the accused, to the exclusion of all other jurisdiction (particularly a subsequent prosecution on an alleged subsequent offense) until its authority has served its purpose in the final termination of the extradition case, and in the execution and enforcement of the requirements of the *treaty*, the supreme law of the land, unless it has previously expired by reason of the failure to bring the extradition case to trial to a final conclusion within a reasonable time. In any event, when the extradition case is ended and the warrant has expired, and the accused is finally released, on the extradition charge, he is entitled to "depart in peace" and return to the country of asylum, free from detention or molestation, no matter from what source it may come. The international character of the warrant of extradition gives to it precisely the same supremacy and consequent precedence over the laws and judicial proceedings and prosecutions of the state as is possessed by the *treaty*, and by Section 5275 of the Revised Statutes of the United States. If the sheriff of San Francisco can take the custody of the accused, upon the extradition war-

rant, even though the warrant does not run to him, and he is not appointed by the United States for the purpose, then any person, no matter who, has the power and may hold the accused in custody, and the control and supervision intended by the supreme law to remain with the United States, and to be actually exerted by specific appointment of a custodian, would perish of its own inertia. The truth of the matter is that some one in authority, supposing that the warrant of extradition possessed no further effect after the accused was brought within the state, turned him over to the local power of the sheriff, together with a local bench warrant from the state court, directing the sheriff to arrest and hold him; this with the result that the warrant of extradition was left hanging *in nubibus*, until some one else in authority suddenly discovered that only the warrant of extradition could detain and lawfully hold the accused in custody in the extradition case; then for the first time (and the record discloses it), and during the pendency of the *habeas corpus* proceeding before the state Supreme Court, what purports to be a *copy* of the warrant of extradition was obtained from Canada by the state authorities, and set up in the return to the writ. Of course, the idea that a bench warrant of the state court could reach the custody of the accused, who was held under the supreme and necessarily exclusive authority of the warrant of extradition, was thoroughly absurd. Anyway the sheriff never saw the original warrant of extradition, it being held by Gibson, the agent of the United States, and subsequently by the chief of police of San Francisco. The sheriff never received the copy referred to, as appears on the face of the

certificate on the copy, until after the writ of *habeas corpus* had come up before the state Supreme Court for hearing on the return made. The state Supreme Court in its judgment directs the sheriff to hold the accused on the warrant of extradition; but clearly the court has no power to thus or at all appoint the sheriff for the purpose. The warrant requires and the law of both Canada and Great Britain requires that the necessary appointment be made by the United States and it has not been so made.

8. The *extradition* being for the sole and only purpose of giving the accused a trial to a final conclusion upon the specific charge on which he was extradited, and such being the requirement of the *treaty*, by necessary implication from its very nature, it follows that the only authority for the custody and the imprisonment of the accused is the international *warrant of extradition*. This warrant or process, controls to the exclusion of any and every other process, the custody of the person extradited. All this is self-evident. Now, the *law* constitutes a part of the contents of the warrant of extradition, just as essentially as if written therein in express words, instead of being there by necessary implication. Therefore, the extradition warrant is to be construed precisely as if in terms explicit and absolute it provided that the accused shall be held in custody

> "for the sole and only purpose of his trial to a final conclusion and within a reasonable time, upon the specific charge herein designated, and upon which his extradition is granted, and upon no other charge shall he be brought to trial or prosecuted, until after he has first had a reasonable time and opportunity subsequently to his

> final release or trial upon said charge on which he is hereby extradited, to return to the country granting his extradition, and has failed so to do. And provided, further, that at no time prior to said expiration of his said right to return, shall he be prosecuted or imprisoned nor placed on trial, for or on account of any charge whatsoever, other than the charge in this warrant designated as aforesaid, and for which and upon which this extradition has been granted."

These are the provisions which, according to all the authorities, the law of the *treaty* of 1842 and of Section 5275 of the Revised Statutes of the United States and international law import by necessary implication into every warrant of extradition. The process must be so construed accordingly, and *the imprisonment of the accused must be restricted and confined to these implied terms and conditions of the extradition warrant;* every different imprisonment is consequently null and void, is in violation of both the treaty and the statute, and must be so adjudged.

IV.

JURISDICTION TO DECIDE QUESTIONS RAISED.

In the first place, as to the jurisdiction of the Supreme Court of the United States. Jurisdiction of the *appeal* from the United States Circuit Court is conferred by Act of Congress, and is thoroughly established. In the extradition case of *Rice* v. *Ames*, 180 U. S., 374, the Supreme Court say:

> "As a construction of the extradition treaty with Great Britain is involved, the appeal was properly taken to this court."

And in the extradition case of *Pettit* v. *Walsh*, 194 U. S., 205, 216, the court made a similar ruling. Both were *habeas corpus* cases. There is, however, an important difference concerning the extent of the jurisdiction, between an appeal and a writ of error. Say the court:

> "By a writ of error only questions of law are brought up for review, as in actions at common law, while by an appeal, except when specially provided otherwise, the entire case on both law and facts is to be reconsidered; there seems to be little doubt that, so far as it is essential to a proper decision of the case" (*habeas corpus*) "the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge." (*Ex parte Neagle*, 135 U. S., 1, 42.)

We concede that on the writ of error the court has no authority to review the decision of the state Supreme Court on questions of fact.

> "In proceedings in this court to review the action of state courts, we do not enter into a consideration of questions of fact." (*Gardner* v. *Bonesteel*, 180 U. S., 362, 370.)

Accordingly, upon the appeal from the judgment of the United States Circuit Court refusing the writ of *habeas corpus*, we bring up the entire case, both the law and the facts, for review, but on the writ of error to the state Supreme Court we present for determination questions of law only, and have made no attempt to bring up the evidence. The opinion contains the court's findings of facts. That the Supreme Court of the United States has plenary jurisdiction to consider and determine the questions of law presented on the writ of error is a proposition amply sustained by the provisions of Section 709 of

the Revised Statutes of the United States, and by the court in *Ker* v. *Illinois*, 119 U. S., 436; *Pepke* v. *Cronan*, 155 U. S., 100; *Fitts* v. *McGhee*, 172 U. S., 533, and many other cases.

All the federal questions presented in this brief were specially raised and the treaty and Section 5275 of the Revised Statutes were specially claimed and set up in that behalf by the appellant and plaintiff in error in both the courts below (federal and state), and were decided adversely to him, and all these matters appear affirmatively in the record on the writ of error and in the record on the appeal; and so far as the writ of error is concerned, the facts disclosed by the record bring the case fully and completely within the provisions of Section 709 of the Revised Statutes of the United States. The record shows that the federal questions were not only raised and decided in the state Supreme Court, but were also raised and decided in the state Superior Court, adversely to the appellant and plaintiff in error and to the claims he set up on the basis of the treaty and the statute.

V.

JURISDICTION AND DUTY OF THE UNITED STATES CIRCUIT COURT TO GRANT HABEAS CORPUS.

In the next place, as to the jurisdiction and the duty of the United States Circuit Court to grant in the first instance the writ of *habeas corpus* on the showing made, it must be borne in mind that no evidence was offered to support the answer and return. (Rec., 19.) The Circuit Court fell into the

error of applying to our case the general rule declared in *ex parte Royall*, 117 U. S., 241, instead of enforcing the exception recognized in that and subsequent cases, where the imprisonment is alleged to be in violation of a *treaty* of the United States. In the *Rauscher case*, 119 U. S., 407, the court cited *ex parte Royall* as sustaining by the exception there specified the *right* to *habeas corpus* out of the United States Circuit Court, not simply a matter of discretion, in cases where the prisoner claims that he is restrained of his liberty in violation of a treaty of extradition; and explicitly held that this right entitled the party to the writ of *habeas corpus*, to be issued in the first instance out of the Federal Court, and without putting the petitioner to the necessity of seeking his remedy in the state court, and thence by writ of error to the United States Supreme Court, as required by the general rule.

This same exception to the general rule was referred to and approved by the court in *Whitten* v. *Tomlinson*, 160 U. S., 231, 241.

Mr. Justice Gray, delivering the opinion of the court and pointing out that cases involving *treaties* between the United States and foreign nations, as in *Mali* v. *Hudson County Jail Keeper*, 120 U. S., 1, were to be regarded as cases of "urgency" within the meaning of the exception to the general rule requiring the prisoner to first seek his remedy in the state courts and thence by writ of error to the Supreme Court of the United States.

See, also, *Cohn* v. *Jones*, 100 Fed. Rep., 639.

Then Mr. Spear, in his treatise on extradition, states that the prisoner held in violation of an ex-

tradition treaty is entitled to his release on *habeas corpus* from the Federal Court (Spear on Extradition, pp. 233, 234). The rule is stated somewhat differently in the treatise or rather essay of Hawley on Extradition. After saying that the prisoner cannot lawfully be held on a charge other than the one specified in the extradition proceedings, and that if he is so held, he is entitled to his release on *habeas corpus*, states:

> "If the state courts should refuse to discharge him on his plea in abatement or *habeas corpus*, he may then sue out a *habeas corpus* from a Federal court." (Hawley on International Extradition, p. 12.)

Even under this statement of the rule the appellant was entitled to the writ of *habeas corpus* from the United States Circuit Court, for at the time he applied to that court, as the record here shows, he had exhausted, and without success, every remedy, including plea in abatement and *habeas corpus*, in the state courts unto the highest court of the state. This entitled him under the ruling in *Minnesota* v. *Brundage*, 180 U. S., 499, 505, to the writ of *habeas corpus* from the United States Circuit Court; and according to the doctrine of that case it was an abuse of discretion to refuse it.

The case last cited was not a case of "urgency," such as one involving the violation of an extradition treaty, but the court said:

> "As disclosed by the record, the case, we repeat, is not one of urgency within the meaning of our decisions, and does not suggest any adequate reason why the appellee should not be required *before* applying to the Circuit Court of the United States to be discharged upon *habeas*

> *corpus*, to seek at the hands of the higher courts of the state a reversal of the judgment rendered against him in the Municipal Court of Minneapolis. Without expressing any opinion as to the validity of the Minnesota statute, the judgment of the Circuit Court must be reversed, with directions to dismiss the application for a writ of *habeas corpus*, without prejudice to a renewal of it when the appellee shall have exhausted the remedies provided by the state for a review of the judgment of the Municipal Court of Minneapolis."

Now, that is precisely what we did in the state courts, both by appeal and *habeas corpus*, *before* applying to the United States Circuit Court in the case presented by the record on this appeal; and we did all this because the United States Circuit Court required us to do it. (154 Fed. Rep., 980.)

We fully exhausted every remedy provided by the state, and yet the Federal Court denied us the benefit of the writ of *habeas corpus*. So that whether the case is reviewed as being one of "urgency" within the exception to the general rule referred to (and it certainly comes within the exception relative to treaties, and is a case of "urgency") or is viewed as being within the doctrine above quoted from *Minnesota* v. *Brundage*, the appellant is entitled to the writ of *habeas corpus*, on the showing made, from the United States Circuit Court. The case *In re Frederich*, 149 U. S., 77, cited in the opinion of the Circuit Court, was not a case involving the violation of a *treaty*, and therefore is not in point.

It must be very evident that there exists a case of "urgency" requiring the intervention of the ju-

diciary of the Federal government, in the exercise of the original jurisdiction conferred by the constitution, whenever and wherever by means of imprisonment a violation of a solemn public *treaty* has been committed by or through the agency of one of the states; and this to the end that the *status quo* be speedily restored, and the relations of amity and concord, as well as the good faith existing between the United States and other nations, and the integrity of the *treaty,* be preserved and maintained inviolate against infringement by a state government having no responsibility whatever to the offended nation, but involving the United States in international conflicts and complications, without its privity or its fault. The peace, the honor and the good faith of the nation, and the due performance of international obligations which it has assumed, cannot be made to rest on the exceedingly precarious basis of a vindication and protection from a state government.

This is the admonition of American history and needs no discussion. The international responsibility is alone with the United States as being inseparable from its possession of the national sovereignty; the corresponding duty of upholding the national faith and the national honor must primarily devolve upon the nation. It results that where rights judicial in nature and import are in controversy, and are derived from a public *treaty* with another nation, the duty is primarily cast upon the Federal judiciary to enforce the treaty, and the case is one of "urgency," especially if it is a case of imprisonment in subversion of the treaty. Say a learned court:

> "Whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the state; and whoever may have the right, it is to be protected." (*Baker* v. *Shy*, 9 Heisk, 85.)

And Chancellor Kent says:

> "Treaties are to receive a fair and liberal construction according to the intentions of the contracting parties, and to be kept with the most scrupulous good faith." (1 Kent's Com., 174.)

These fundamental requirements are best enforced by the national judiciary rather than left to the delays and crudities of local administration, influenced and swayed by sympathies and prejudices antagonistic to the *treaty* and to the obligations it imposes, or perhaps, as in our case, antagonistic to the rights and to the protection it gives to the accused. Foreign nations in making treaties with the United States do not and under our system of government cannot know nor deal with the several states at all, nor give them a co-ordinate recognition. National sovereign is vested exclusively in the United States. The Supreme Court has said:

> "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all of which are forbidden to the state governments." (*Knox* v. *Lee*, 12 Wall., 457, 555.)

It could not remove nor impair or lessen the duty of the United States Circuit Court to grant the writ of *habeas corpus* and on the showing made discharge

the prisoner; that the writ of error had been sued out and is in course of prosecution (*Eastern Association* v. *Welling*, 103 Fed. Rep., 352; *Tinsley* v. *Anderson*, 171 U. S., 103).

If the Circuit Court had granted the writ of *habeas corpus*, as it was required to do by law, and by the record before it, and had discharged the appellant from imprisonment, as was clearly its duty, there would have been no occasion to further prosecute the writ of error, and the questions it presents would have then become merely *moot* questions in the litigation, and for that reason not further justiciable. In addition to this, it must be very evident that the pendency of the writ of error is no answer to the contention that the appellant is entitled, *as of right*, to the writ of *habeas corpus* from the United States Circuit Court, issuing from the court in the first instance, and irrespective of whether or not he has exhausted all remedy in the state courts. It is a maxim of the law that *non potest adduci exceptio ejusdem rei cujus petitur dissolutio*. The supersedeas on the writ of error is directed against the judgment and not against the questions involved. Besides this, after he had exhausted all remedies in the state courts, and without success, and still being denied the rights given him by the *treaty*, surely he had then, if ever, the right to relief by *habeas corpus* issuing out of the United States Circuit Court. The law made it the duty of that court to grant him the writ and discharge him from imprisonment, thereby enforcing the *treaty*, as against its violation by the state,—a violation upheld and maintained by the highest

court of the state. The appellant complied to the utmost extent with all doctrines of comity and courtesy; he afforded the state and the state courts every opportunity to correct the wrong done; he did not (and the record here so discloses) interfere with the regular administration of the criminal law of the state, by interposing, nor seeking to interpose the process of the Federal Court while the criminal case was pending.

The functions of the state, respecting the case in all its phases, had finally terminated, and the rights and the protection he invoked under and pursuant to the *treaty* had been finally denied and rejected by the state and by its courts. Clearly, it was then, if ever, the *duty* of the United States Circuit Court to exercise its jurisdiction and to enforce the treaty, and upon the showing made issue its writ of *habeas corpus* and discharge the appellant from imprisonment; and do this in obedience to the supreme law of the land, and not remit the prisoner to the slow process of a writ of error.

There can be no doubt whatever that *habeas corpus* is the proper remedy. Say the Supreme Court of New York:

> "The further question is raised whether relief can be had by *habeas corpus*, and it is insisted that the only remedy available to the relator is in review of the judgment by appeal, and that at all events that remedy should first be exhausted."

The court holds to the contrary, and decides that *habeas corpus* is the proper remedy in a case of international extradition, where the accused is impris-

oned in violation of the treaty and of Section 5275 of the Revised Statutes of the United States.

The decision was affirmed by the New York Court of Appeals. (*People* v. *Stout*, 81 Hun., 341; *Ex parte Knight*, 48 Ohio St., 588; *Cohn* v. *Jones*, 100 Fed. Rep., 639; *Cosgrove* v. *Winney*, 174 U. S., 64; *Johnson* v. *Browne*, 205 U. S., 309; Spear on Extradition, pp. 233, 234; Hawley on International Extradition, p. 12.)

We pass then to the presentation of further facts disclosed by the record. The salient features of the case have already been stated in this brief; but it will be proper to go into more detail and further discussion, as tending to a clearer and more satisfactory understanding of the case; and of the questions presented.

VI.

FURTHER FACTS OF THE CASE AS DISCLOSED BY THE RECORD—DISCUSSION.

1. First as to the facts common to both the appeal and the writ of error: In the early part of July, 1905, the appellant and plaintiff in error departed from San Francisco and established his residence and domicile in Canada. Whether he sought refuge from relentless persecution and from irrepressible hostility, as well as protection from an evident determination on the part of state courts to deny him through prejudice and enmity the equal protection of the law, and whether he went in order to escape the power and influence of those arrayed against him and against his rights, are matters not

to be discussed here, however much they may justify him. Whether he can rightly say, "and if any tax me, as Laban taxed Jacob, 'wherefore didst thou flee away secretly, without taking solemn leave?'" And answer, as did he, "Because I was afraid," and that plain dealing patriarch who could not be accused of purloining a shoe latchet of other men's goods, confessed himself guilty of the awful felony that he "stole away" for his own safety, seeing Truth may seek corners, not as fearing her cause, but as suspecting her judges, are matters he cannot urge at this time, be they ever so well sustained by the circumstances inducing his departure. Says Lord Bolingbroke:

> "If to decline in certain circumstances a trial; if to go into voluntary exile, either before a trial or even after condemnation, were absolute proofs of guilt, the conduct of many greater and better men than the person now accused would deserve our censure, and that of calumniators as vile as these libellers would merit our approbation. Metullus and Rutilius must be condemned—Apuleius and Apicuis must be justified."

We might if it were necessary in rightful explanation of our action, refer to the sentiments expressed in the letter of Lord Clarendon, addressed to the House of Lords, defending his departure from England when under impeachment; and we might well invoke the reasons given by him why a man unjustly accused should evade meeting an unscrupulous prosecution. (Compare Lister's Life of Clarendon, Vol. 3, p. 415, *et seq.*) The most innocent person may deem a trial too great a risk to encounter. He may be assured that powerful and

wealthy individuals have resolved on his ruin, and that witnesses have been suborned to bear false testimony against him; and he may rightly discern an absolute impossibility of securing a fair and impartial trial and the equal and just protection of the law. What is he to do? Must he go forth and meekly submit to the destroying condemnation prepared for him, no matter how innocent he may be? The criminal law of a state has often been used as an engine of private vengeance; must he willingly respect its authority because it wears the sacred form of law, and permit himself to be the victim, making no effort for his own protection against the power and influence of his enemies? Self-preservation, the very highest of laws for the security of the individual, amply vindicates on the very strongest principles of justice the right of another country to extend to the persecuted and oppressed the protection of its sovereignty. While government protects the citizen, it is his duty to render himself amenable to its jurisdiction; but when its great powers are being despotically abused and perverted for the purpose of his destruction, he is not only justified by the higher law, but it is a duty resting upon him with its obligation inherent in nature, to seek his safety and welfare in the sovereignty of another nation, competent and willing to extend him adequate protection. On this foundation is built the American commonwealth; historically it is the fundamental doctrine of the republic.

After the appellant and plaintiff in error had, as stated, established his residence and domicile in Canada, there was filed against him in the Superior

Court of San Francisco an indictment purporting to charge him with the crime of perjury in verifying by his oath before a notary public his answer and plea to a complaint filed in the civil department of the same court, in May, 1905, in a suit for alimony and permanent support, the gist of this perjury charge being that in his answer and plea he falsely made denial of the averment of the complaint that he had married the plaintiff in the suit, one Charlotta Newman.

This civil suit is still pending and has never been brought to trial, so absolutely without merit is it; it was at issue and ready for trial in June, 1905. It fairly and squarely presented for decision the question whether the accused ever married the plaintiff. The legitimate and decent, and according to the ethics of the legal profession, the only respectable course of procedure would have been to procure *in the civil suit* a judicial determination of the issue as to the truth or falsity of the denial in the answer, of the averment of marriage, instead of resorting to the oppression of the criminal law by means of a charge of perjury, and pursuing against the defendant a system of relentless persecution designed simply to destroy him;—the insatiable lust of revenge that has made "countless thousands mourn," and given cause to almost believe with Ruskin, that the race is still half-serpent, not extricated from its clay; a lacertine breed of bitterness,—the glory of it emaciate with cruelty and inhumanity, and blotted with venomous stain; and the track of it, on the leaf a glittering slime, and in the sands a useless furrow.

In the month of October, 1905, the appellant and plaintiff in error was, upon the demand of the United States, and pursuant to the *treaty*, extradited from Canada, for the sole and only purpose of being placed on trial upon the specific charge of perjury, wherein he was accused of falsely taking oath before a notary public in verification of his answer and plea to the complaint in the civil suit above referred to,—the denial going no further in law than tendering issue upon the averment in the complaint that he had married the plaintiff. In due course, and about thirty days after the surrender in extradition, he was placed on trial in the Superior Court of San Francisco, on this specific charge of perjury on which he had been extradited. On December 22, 1905, the jury in the case having heard the evidence, *disagreed* and were discharged. The case was then again set down for trial on an early day in the following month, but before the day selected arrived, and on December 29, 1905, *another and different indictment* was found and filed against appellant and plaintiff in error, in the same Superior Court, purporting to accuse him of another and altogether different offense of perjury, to wit: in testifying as a witness in his own behalf, on the trial or rather mis-trial of the extradition case, that the parties to a certain marriage *ceremony* were himself and Agnes Newman, the indictment charging that this was false in that the *ceremony* (not the marriage, as in the first indictment) was with said Charlotta Newman. Both the indictments are in the record on the writ of error.

It should, perhaps, be explained, in passing, that, among many other points, the accused contended, as is the fact, that previously to the marriage ceremony in dispute he had legally married Agnes by common law marriage, and that, she afterwards desiring a religious ceremonial, he, in order to gratify her wish, arranged for the subsequent ceremony, which occurred with *her* and not Charlotta Newman, who was simply, at the instigation of others, wickedly taking advantage of a mistake or error in the certificate, caused by transposition of or a mistake in the names —one being a principal and the other (Charlotta Newman) a witness to the ceremony. And that, in any event, the valid, pre-existing marriage with Agnes rendered absolutely null and void any subsequent ceremony had it occurred with Charlotta Newman; such not only being the rule of the common law, but the express declaration of the California statute; that, therefore, any false testimony (there was none) that the *void* ceremony occurred with Agnes and not with Charlotta Newman, being no evidence of a marriage, was as held by all the authorities on the point, both in England and the United States, *no perjury*. The California courts avoided the necessity of so deciding by simply ignoring the point, and passing on the case upon the assumption that the ceremony was a valid instead of a void marriage with either woman,—a very flagrant instance of *petitio principii*. We are not permitted to here suitably criticize this indefensible action on the part of the state courts, and must be content with merely stating what was done. Now, the prosecution considering it would be easier for them to

produce evidence as to the marriage ceremony than it would be to show that the accused *married* Charlotta Newman,—the pre-existing marriage to Agnes preventing,—dropped the extradition charge, which required them to prove a *marriage*, and substituted the second charge of perjury, which merely required them to produce evidence of a mere ceremony; and the accused was not even permitted by the state courts to show that this ceremony, had it occurred with Charlotta Newman (and it did not), was absolutely null and void by reason of the pre-existing and perfectly valid marriage to Agnes; therefore, testimony relative to the ceremony could not be perjury. (2 Wharton Crim. Law, Sec. 1282.) There were many other fatal defects in the evidence in the extradition case besides this one of failure to prove a marriage as differentiated from a mere marriage ceremony, which was provable *prima facie* by what was in fact an erroneous certificate. The defects in the proofs in the extradition case were sought to be obviated by the prosecution in having recourse to the second perjury charge; besides, it was also thought by the prosecution that it would serve to effectually dispose of and get rid of the extradition and of the rights and protection conferred on the accused by the *treaty*, by Section 5275 of the Revised Statutes of the United States and by international law; and all this by the simple method of dropping and discontinuing the active prosecution of the extradition case and substituting the second perjury charge, on which and in respect to which there had been no extradition.

At the time set for the next trial of the extradi-

tion case, to wit: in January, 1906, the prosecution, manifestly intending to substitute the second perjury indictment for the extradition charge, sought from the state court a postponement of the trial of the latter, and the court, over the objections and protest of appellant and plaintiff in error, based on the treaty and the federal statutes, granted the postponement to various successive dates, until finally the second perjury indictment was at issue and on the trial calendar of the court in February, 1906, when, over his objection, expressly predicated on the rights conferred upon him by the *treaty* and by Section 5275 of the Revised Statutes of the United States, all of which is shown by the record, this second charge of perjury was, on motion of the prosecution and by order of the same court, and within sixty days after the disagreement of the jury in the extradition case, actually placed on trial in substitution of and to the exclusion of the case in which and the specific charge upon which he had been extradited; *and despite the fact that he was at the time held under the supreme authority and exclusive jurisdiction of the international warrant of extradition.* The further prosecution of the extradition charge was discontinued, although appellant and plaintiff in error demanded of the state court and of the state that he be first given a trial to a final conclusion of the extradition case. This demand was refused. The record, both on the appeal and writ of error, is very clear on all these matters. He was convicted on the second perjury charge, and, against his objections, expressly based on the *treaty* and on Section 5275 of the Revised Statutes of the

United States, he was, on this second charge, sentenced by the trial court to imprisonment in the penitentiary for the maximum period of fourteen years,—certainly not very suggestive of fairness or moderation in the proceedings. In fact, the accused was not given a fair trial; and the adverse result was only attained after depriving him of the protection of those fundamental rights which the law secures to every person accused of crime; and amply justified the reasons which induced his departure for Canada, as a proper and necessary course in self-defense against persecution, oppression, and the power and influence of his enemies. It would not be proper to go on in this brief and direct attention to the personal animosities and difficulties existing between the accused and his judges; perhaps—and he deferentially ventures the suggestion,—it would have been more to the interests of justice if the enmity prevailing against him had acknowledged its prejudice and refused to sit in the case. He is told that his "professional activity" is to be blamed for much of the hatred existing; but, without going into the merits of the matter, as that is prohibited him, he is sure of the rectitude of his conduct and of his intentions. If he was seemingly offensive because thought too aggressive in the defense of the rights of his clients, his professional zeal should not be set down to malice; he never stopped, it is true, to consider how strongly entrenched or exalted in power were those whom duty required him to attack; and in consequence, no doubt, his conduct has brought resentment and inspired revenge from the powerful and influential. However, the subject is one that he

is not allowed to discuss. He realizes that it makes no difference; it is not a matter involved in this case; yet it would have been better if these things did not exist; and it would have been better if the judge whose impeachment he had sought some time previously, when occupying other judicial office, had not cast the deciding vote in the court of appeal in affirming the conviction on the second perjury charge. It is only important here to know that, so far as the State of California is concerned, the conviction and sentence are final; nor can it make any difference that the main points urged by him for reversal of the judgment were not the subject of the decision in the District Court of Appeal; if they were the results might have been different. It is but natural that he should resist and complain, for great wrongs have been done him. Nor is it important to know, in this case, the reasons why he was refused by the state Supreme Court a review of the decision of the District Court of Appeal. Neither can it make any difference that, on retiring from office and in his final message, the governor of the state went considerably out of his course in an attempt, while the case was before the courts, to influence the final results of the prosecution adversely to the accused, and did so by means of a most scurrilous and libelous attack upon him making it necessary for the senate of the state to do him the justice of spreading his reply upon its official minutes. (Journal of Senate of California, 37th Session, January 24, 1907, page 2.) While all these things are a part of the history of the case and are matters of common notoriety, and give complexion to the liti-

gation, yet he must concede they furnish no useful analogy nor illustrate any principle of law pertinent to the questions here presented. The public press went to incredible extremes in its libelous and infamous abuse of the accused; and in its intimidation of jurors, till the very atmosphere of the state courts became surcharged and vibrant with malignant and powerful prejudice against him and against his legal rights. There is such a thing in California, at least in San Francisco, as government by newspaper supplanting government by law. This interference by irresponsible newspapers with courts and jurors in the administration of the law is surely a strange and portentous despotism, and combines two most fatal elements of tyranny, popularity and an enmity to all individual excellence. We need hardly say there is no good cause for this prejudice against the accused; and it would make no difference if there was. He had attained some prominence in his profession. He came to be considered, more than any one else, the sponsor, in criminal cases especially, of what the extremely learned editors of the public press derisively, in the plenitude of the conceit of ignorance, very abusively criticize and hysterically attack as the "technicalities" of the law,—a something beyond their comprehension, and, therefore, to be hated and despised, especially when resulting in the rightful liberation of those whom the newspapers have persecuted or vilified in scurrilous and sensational paragraph or editorial, or against whom they held a special employment to calumniate and libel. There is no worse menace to the stability of American institutions than the toleration by the

judiciary of newspaper interference and even dictation in the trial and decision of cases; and we have always vigorously resented it, as we were in duty bound. For these reasons, and because, also, we had in the practice of law forced many in "high places" to make just reparation for wrongs perpetrated, and did not hesitate to expose and condemn the very censurable deficiencies of the local bar, we have at least succeeded in bringing upon our earnest efforts in the performance of duty the penalty of making many enemies, yearning for our retirement to perpetual oblivion. There are those who have an inherited faith in the efficacy of the criminal law as an engine of individual extermination, and our enemies seem to be of that hereditary taint.

Three years and more have elapsed, and yet no trial to a final conclusion of the extradition charge; and still, according to the decision of the state Supreme Court on the writ of *habeas corpus*, we must continue in custody, indefinitely, and perhaps perpetually, under the warrant of extradition, even unto taking its authority and dignity (but denied its protection) along with us into the oblivion of fourteen years' burial in a California penitentiary, if the state courts can have their way about getting rid of international extradition process, and of repudiating the high obligations of a solemn public treaty between two great nations. There is no reason whatever why the extradition case was not prosecuted to a trial to a final conclusion, instead of the second charge of perjury,—the non-extradition charge, except, as we have already pointed out, that the prosecution had *no evidence* to sustain the charge

on which the accused was extradited, and believed they could attain the much-desired result more easily and satisfactorily to themselves by substituting the other charge; and also supposed that in this way they could deprive the accused of the rights and of the protection conferred upon him by the treaty of extradition and by Section 5275 of the Revised Statutes of the United States.

It must be manifest that the state has been placed in the attitude of saying to the United States:

> "We want Mr. Collins extradited from Canada on a specifically described charge of perjury; we know we have not sufficient evidence to convict him on that charge. We, therefore, do not propose to bring him to trial to a final conclusion on that special charge; but we will extradite him and take the chance of his committing some other offense while we have him in custody under and upon the faith and the authority of the *treaty* and while we hold him by virtue alone of the obligation of the extradition process to give him the required trial to a final conclusion on the charge therein specified, *which we will not do.* If, perchance, he commits some subsequent offense, or if we can contrive to make it appear that he had done so and such, too, is our purpose, then, while the extradition case is pending and awaiting final trial we will arrest, prosecute and convict him of committing an offense subsequently to his surrender in extradition, and give him the extreme penalty, dropping the extradition case, and resting satisfied with the results."

Now, we ask, in all earnestness, could a worse fraud than this be perpetrated on the *treaty*, and on the rights conferred by the treaty on the accused, if the United States was to lend its sanction

and its authority to such a scheme and secure the extradition? Yet this is precisely what has occurred in effect and results. Says SPEAR at page 82 of his treatise on Extradition:

> "The surrendering government, in every such case, would have no opportunity to pass judgment upon the evidence with reference to the question of its duty to make a surrender of the party for the crime for which he was tried. It would as to the purpose for which it did make the surrender, be cheated by what would be equivalent to an act of bad faith; and whether the cheat was deliberately planned, or was simply an afterthought, would make no difference with the fact itself. In either event, the purpose for which the delivering government, under the stipulations and obligations of a treaty, granted the custody, and which was avowed by the demanding government in making the requisition, would not be the one for which the custody would be used."

Nor can it for a moment be imagined that Great Britain or Canada, would grant the extradition if informed of the purpose contemplated, or if told of the scheme resolved upon by the state officials, and those aiding and abetting them to defraud both the treaty and the accused.

Say the Supreme Court of the United States:

> "The general scope of the two treaties," (referring to the Ashburton treaty of 1842 and the convention of 1889) "makes manifest an intention to prevent a state from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then, having obtained possession of his person to use it for another and different purpose." (*Johnson* v. *Browne*, 205 U. S., 309.)

A treaty is to be construed so as to exclude fraud

and to make its operation consistent with the highest good faith,—*uberrima fides.* (2 Wharton's Dig. Int. Law, Sec. 133.) The treaty furnishes both the facility and temptation to defraud itself, if we assume that a state having obtained the extradition of a person on a specific charge of crime, may then, in its discretion, or at its will prosecute him for some other crime or alleged crime, or may use the custody thus acquired for other purposes than the one purpose designated in the extradition proceedings. Nor does the fact that the second and non-extradition charge is also perjury, and alleged to have been committed by the accused in testifying to his innocence of the charge on which he was extradited, in the least degree mitigate or palliate, but on the contrary, seriously aggravates the wrong committed against the *treaty* and against the rights conferred, by the *treaty* and by Section 5275 of the Revised Statutes of the United States, upon him. Had he been given a trial to a final conclusion on the extradition charge, and acquitted on the ground that the matters assigned as perjury on that charge, to wit: his denial of a *marriage* to one Charlotta Newman, were the truth, it would in law have been *res adjudicata* of the principal issue involved in the second charge concerning the mere marriage ceremony (*United States* v. *Butler*, 38 Fed. Rep., 499; *Coffey* v. *United States*, 116 U. S., 436, 446; *Cooper* v. *Com.*, 106 Ky., 909); and the latter would necessarily fail. Surely, it is self-evident that if the accused was acquitted on the extradition charge, and he then in due time, returned to the country of asylum, neither Great Britain or Canada would grant

or consent to his extradition on the second perjury charge. It follows that what the state could not do directly, it has done indirectly, and by violating the *treaty*, by violating Section 5275 of the Revised Statutes of the United States, and by violating international law. Manifestly, it was the right conferred on appellant and plaintiff in error by the *treaty* to secure a trial to a final conclusion of the extradition case, and to thereby obtain in that case, and under the protection of the treaty, and of the law of the extradition, an adjudication which, in legal effect, would have effectually disposed of the very issue afterwards presented on the second charge of perjury; for had it been adjudged in the extradition case that the accused swore to the truth when, in the civil suit for alimony and support, he on oath denied he *married* this Charlotta Newman, the plaintiff in the suit, then in legal effect this adjudication would have also disposed of the relevancy of the question whether there had been a marriage ceremony with her, or with Agnes Newman; for the latter question as to the ceremony, so far as relevant, must necessarily be subordinate and subject to and is included in the ultimate question of marriage or no marriage with one woman or the other.

But *e converso*, an adjudication that the ceremony did or did not occur would be no determination that there was or was not a marriage.

If the scheme of dropping and discontinuing the prosecution of the extradition case, and thereby preventing the adjudication that would have precluded all further prosecution, and taking up in its stead, substituting for it, and prosecuting to a final con-

clusion, to conviction and sentence the second perjury charge, if this is not depriving the accused of the supreme rights and protection conferred upon him by the *treaty,* and by the Federal statute,—the right to a trial to a final conclusion of the extradition case, to the exclusion of every different prosecution, and the right to return, without detention, interruption, or interference, to the country of asylum, to "depart in peace," on his acquittal of the charge upon which he was extradited, and of his right to obtain an acquittal, then it must only be because the fraud attempted is impossible of being accomplished. The violation of a right conferred by the treaty is a violation of the treaty. The treaty must first be obeyed. Any other doctrine would open wide the door to all sorts of schemes and devices in fraud of the treaty, and of the rights it confers on the extradited prisoner. If a new and glaringly revolutionary doctrine is to be declared in repudiation of the treaty itself, and to the effect that the commission of a subsequent extraditable offense deprives the accused of his supreme right in execution of the treaty, to a trial to a final conclusion of the charge on which he was extradited, and of his equally supreme right to return to the country of asylum, on his acquittal of the extradition charge, and of his right to procure such acquittal, it would be well to first stop and consider that the *treaty* gives the sovereignty granting the right of asylum, a very controlling interest and authority in determining whether there is *prima facie* evidence that the subsequent offense was committed;—a matter already fully discussed in this brief, and again here-

after presented in citing the authorities in the part assigned more specifically to the argument, under the heading or title "Further Argument on Main Propositions. Fundamental Principles of the Law of International Extradition," and the succeeding chapters of the brief. Nor is it to be supposed that the courts will take it upon themselves to thus defeat the treaty and radically change the law; and in any event, even if they did, the objection still remains that no subsequent prosecution on an alleged subsequent offense is possible until *after* the final termination of the extradition case; and this, on jurisdictional grounds, also in this brief, already explained *in extenso*. The principle is that the extradition jurisdiction is derived from the treaty, the supreme law of the land, and like the treaty, is supreme and paramount, and therefore exclusive; in addition to this, it is the jurisdiction *first* resting over the person of the accused, and for that reason also has precedence to the exclusion of any and every other and different jurisdiction. Say the Supreme Court of the United States:

> "It is a principle of universal jurisprudence that where jurisdiction has attached to a person or thing, it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function." (*Taylor* v. *Taintor,* 16 Wall., 370.)

All of which is quite axiomatic. The fundamental requirement of the *treaty* is that the accused must be given a trial to a final conclusion of the extradition charge, within a reasonable time, and to the exclusion of any other charge. Not until this is done and the extradition jurisdiction terminated, is it

possible to acquire any other jurisdiction on any other charge, over the person of the accused; and we insist that even then, no further and other jurisdiction can attach until he is first afforded a reasonable time and opportunity to return to the country of asylum, and fails to avail himself of the right. It may be a very convenient thing to hold him and prosecute him on an alleged subsequent extraditable offense, and arbitrarily cut off the right of asylum, as well depriving the nation of asylum of its prerogative in right of its sovereignty to first determine from the evidence adduced whether there is sufficient *prima facie* proof to indicate that the subsequent offense was committed and is not fictitious or merely a pretext or a subterfuge; and it may be, as suggested by the court below, that if the accused is permitted to avail himself of his legal and paramount right to return to the country of asylum he can for the time being and perhaps permanently make good his escape, and the "offended law" totter to its fall for want of vindication in the special case,—though we may be permitted to doubt it. We do not see how such considerations can properly influence the judicial mind, nor cause a court to halt and turn back from the performance of its manifest duty to follow the law. Says Mr. Justice STORY in the case of *The Isabella*, 6 Wheat., 72:

> "This court is bound to give effect to the stipulations of a treaty in the manner and to the extent which the parties have declared and not otherwise. We are not at liberty to dispense with any of the conditions and requirements of the treaty or to take away any qualifi-

> cation or integral part of any stipulation, upon any notion of equity, or general convenience, or substantial justice."

The Supreme Court of the United States, in a recent case of international extradition, very forcibly said:

> "While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought, by doubtful construction of some of its provisions, to obtain the extradition of a person for one offense and then punish him for another and different offense." (*Johnson* v. *Browne*, 205 U. S., 309.)

If the subsequent offense is extraditable, the accused may be prosecuted, but, as rightly should be, only upon the authority of a *new* extradition; if not extraditable, then the *treaty* by omitting the offense from the enumerated list, from highest considerations of international policy, and in deference to "the sovereign right of asylum," grants the accused the immunity; and the state where the offense was committed, no more suffers than if it were a case of a prior instead of a subsequent non-extraditable offense.

As we shall clearly establish further on in this brief, the extradited prisoner can only be prosecuted by authority of the *treaty;* without the treaty it would be impossible to prosecute him at all, crime being entirely local. The treaty, then, is the source and measure of the authority conferred; beyond that in a given case, the prosecuting state cannot go, unless it obtains the authority of a *new* extra-

dition. The point is that by the extradition, the asylum conferred is only relinquished *pro tanto*, and retained as against trial or prosecution on all other charges on prior or subsequent, extraditable or non-extraditable offenses, with the right to a new extradition for an extraditable offense committed subsequently to the first surrender. If this right of asylum is waived or lost by failure of the accused to avail himself of it in due time, after his acquittal or release, then he may be prosecuted upon any charge, prior or subsequent, and irrespective of the extradition proceeding, or of the treaty.

It is conceded on all sides that the second charge of perjury is not the offense for or on account of which the extradition was granted. It has a resemblance, at least some resemblance in some respects to the preceding charge; but of course, this does not establish identity. Even if the evidence were the same in both cases, this would not make the offenses the same.

> "We do not think," say the Supreme Court of the United States in the *Rauscher Case*, "the circumstance that the same evidence might be sufficient to convict for the minor offense which was produced before the committing magistrate to support the graver charge justifies this departure from the principles of the treaty."

The evidence on each of the two perjury charges is essentially and necessarily different. In one case the oath is alleged to be before a notary public in verification of a pleading. In the other it is alleged to be before the court on a trial of the extradition case. One charge is in denying a marriage with the plaintiff in a civil suit; the other charge is in

testifying as a witness on the trial of the extradition case, that a certain so-called marriage *ceremony* occurred with a woman other than the party who brought the civil suit, but not in testifying that this ceremony constituted a marriage, for his testimony was that the *ceremony* did not constitute a marriage. The matter has already been sufficiently explained in this brief. A decision or adjudication, however, in the extradition case that the accused did not *marry* the plaintiff in the civil suit would have resulted in his acquittal on the extradition charge, and would have been *res adjudicata* of the second charge of perjury. This point also has been sufficiently discussed and the authorities fully supporting it have been cited.

Says LAWRENCE:

> "The fact that a person is extradited only for the crime, that has been *prima facie* proved against him, shows that the treaty would be evaded if he was tried for another offense included in the extradition treaty, or even for one of the same character, provided it was not the identical case for which the proofs were adduced and to which they are applicable. The proceedings, indeed, on which the extradition is founded, have been assimilated to an indictment by a grand jury." (14 Albany Law Journal, p. 90.)

The second charge of perjury is not therefore covered by the extradition.

2. In the next place, as to the situation presented on the record brought up from the judgment of the United States Circuit Court, on the appeal. It exhibits all the facts already stated in respect to the extradition, and the subsequent prosecution to con-

viction and sentence on a charge entirely different from that on which the accused had been extradited; and that the extradition case has never been prosecuted to a trial to a final conclusion; further, that more than three years have now elapsed since the extradition surrender, and the accused is still imprisoned, upon the charge on which he was extradited. In short, all of the controlling and essential facts, already fully presented in this brief, appear in the record on the appeal, including the bill of exceptions, as well as in the record on the writ of error. There was no evidence offered in the case on appeal in support of the answer and return (Rec., 19), although the court gave the respondents ample notice of the need of such evidence (Rec., 21). Of course, in any event, what is alleged in the petition and not controverted in the return is considered admitted, to the extent that it is not controlled by the evidence. It is a

> "necessary and well settled rule that in a petition for a writ of *habeas corpus*, verified by the oath of the petitioner as required by U. S. Rev. Stat., §754, facts duly alleged may be taken as true, unless denied by the return or controlled by other evidence." (*Kohl* v. *Lehlback*, 160 U. S., 293.)

But at no time has there been the least dispute that the accused has been extradited on a specific charge of perjury and actually brought to trial and convicted upon another and altogether different charge of perjury, and this while the extradition case was pending and awaiting trial to a final conclusion, and while he was held under and by virtue of the supreme and exclusive authority of the extra-

dition jurisdiction. Nor is it disputed that the extradition case has never been given a trial to a final conclusion, although he was extradited in the month of October, 1905, and is still held in actual custody, upon the extradition warrant. These facts and all of them are conceded in the return as it appears in both the record on the writ of error and the record on the appeal.

And it is also conceded that the accused never waived, but on the contrary, always insisted upon the rights granted him by the *treaty*, by Section 5275 of the Revised Statutes of the United States and by international law. The return to the rule *nisi* in the United States Circuit Court, makes reference to a previous application for *habeas corpus* (Rec., 8), when the court held (the decision was not on the *merits*, and not *res adjudicata*) that the petitioner must first await the decision of the state court of appeal before making his application for the writ. (154 Fed. Rep., 980.) This he not only subsequently did, but as the record shows, (Rec., 5), he even went back to the State Supreme Court for *habeas corpus* on the new state of facts, and was denied relief. He then having at last complied with all the conditions imposed by the decision in 154 Fed. Rep., 980, again petitioned the United States Circuit Court, upon a complete showing in the petition, of all the facts, and clearly indicating that he had exhausted all the remedies provided by the state and without success; but the Circuit Court nevertheless held that his only relief lay in the Federal writ of error to the State Supreme Court (Rec., 19). As already fully established in this brief, the course pursued by the United

States Circuit Court was from its inception to the end, contrary to and in conflict with the well settled law upon the subject; and certainly operated to deny the appellant the equal protection of the law. It was the duty of the court to grant the writ of *habeas corpus* irrespective of whether any relief had or had not been sought in the state courts; it was enough that the case involving as it did an imprisonment in violation of the *treaty*, was therefore one of "urgency" within the exception to the general rule; and after compelling the appellant by its decision reported in 154 Fed. Rep., 980, to nevertheless exhaust all remedies furnished by the state and he having subsequently done so, without success, it was clearly then, if ever, the duty of the Circuit Court to grant him the writ of *habeas corpus* and discharge him from the imprisonment, regardless of whether a writ of error to the State Supreme Court was then being prosecuted. His discharge would have ended that proceeding. All these propositions have been fully presented and the authorities sustaining them have been cited in this brief and need not be repeated here. The consequence of the refusal of the United States Circuit Court to grant the writ of *habeas corpus* and discharge the appellant is that he still remains imprisoned in violation of the *treaty;* and it will be more than a year from its issuance before the writ of error can be heard. Such a remedy is plainly inadequate; and the Supreme Court of the United States evidently had this in view, when in the *Rauscher Case*, it was explicitly held that the prisoner was entitled to the writ of *habeas corpus* from the Circuit Court in the first instance, and citing *ex parte*

Royall as authority for this exception to the general rule, as it was there held that a person imprisoned in a case involving the foreign or treaty relations of the government with other nations, would be entitled to the writ of *habeas corpus* from the proper Federal Court without being required to first resort to the state courts for redress, and the case would be considered one of "urgency" within the *exceptions* to the general rule providing for recourse to the courts of the state; but we have in the earlier part of this brief fully discussed the point, and respectfully refer to what is there said, and to the authorities there cited.

The Circuit Court clearly erred in refusing to permit appellant to prove that the sheriff was never appointed by the United States to receive or hold the custody of the accused (Rec., 20); and also in refusing to receive proof in the same connection that without appellant's consent and against his will and without the consent of the United States and Great Britain, the State of California removed him from the custody of the agent of the United States, the Thomas Gibson mentioned in the warrant of extradition, and placed appellant in the custody of the sheriff of San Francisco by whom he has ever since been imprisoned. The proffered proof was clearly relevant and within the issues, and established the trespass committed by the state in taking appellant out of the custody and control of the extradition process and putting him in the local custody of the sheriff, in an effort to supersede and destroy the extradition jurisdiction. It also was competent for the appellant to show that he did not con-

sent to a transfer of jurisdiction over his person from the extradition case to the second perjury charge. This fact, however, elsewhere appears in the record. At page 21 of the record on the appeal will be found all the facts necessary to establish the point as to the substitution of the second perjury charge for the extradition case and the failure without excuse to bring the latter to trial within a reasonable time.

Says the *uncontradicted proof* in the record at page 21,

> "That the petitioner on the date set in January, 1906, for the further trial of said extradition case, insisted upon the trial thereof, but the State of California and the said Superior Court overruled his demand and held that he would not at that time be given a further trial of said extradition case, but must stand trial on said indictment of December 29th, 1905, to which ruling of said Superior Court he duly reserved his exception. That ever since then the petitioner has at all times demanded and insisted upon the trial of said extradition case, but on motion of the State of California the said Superior Court refused to give him a further trial thereof. That at all times the petitioner has objected to the postponement of the trial of said extradition case."

Further on, at the same page of the record is the following *uncontradicted proof*:

> "That said extradition case could have been brought to trial in said Superior Court in the month of *January, February or March*, 1906, and instead of said trial on said indictment of December 29th, 1905."

The further and other essential facts on the appeal appear in the petition for the writ of *habeas*

corpus, not controverted in the return nor controlled nor affected by the evidence. (*Kohl* v. *Lehlback*, 160 U. S., 293.) There was no evidence offered in support of the answer and return (Rec., 19).

VII.

FURTHER ARGUMENT ON MAIN PROPOSITIONS. FUNDAMENTAL PRINCIPLES OF THE LAW OF INTERNATIONAL EXTRADITION.

The argument now to be presented and the authorities we will cite to sustain it, are directed to the first four of the six following points urged by the appellant and plaintiff in error, to establish the errors assigned in the record, and those specified in this brief, on both the appeal and writ of error; and to establish his right to his discharge from imprisonment. The other two points have been sufficiently discussed in the earlier part of this brief, and the authorities sustaining our contentions in that behalf, are there cited; we know of none to the contrary. As stated, the argument now to be presented is addressed to the following four points and the authorities we will cite are in support of these points alone. The purpose is to furnish in this part of the brief, the law fully upholding and establishing the entire correctness of our position on all the propositions we have urged, with the exception of the two points stated; the latter are here omitted from the argument about to be made, because we think that what has been said in this brief on the matters to which they pertain, as well as the authorities already cited in that connection, sufficiently

cover the ground, and it would be impossible to do more than have recourse to unnecessary repetition.

1. First, we insist that by virtue of the *treaty*, the accused has the legal right to a trial to a final conclusion, of the extradition case; that this right is supreme, paramount and exclusive over all laws and all judicial or other process of the State of California, and imposes an obligation which the state must *first* obey and perform as of supreme and paramount authority, and to which all its laws and process and judicial power are necessarily inferior, subjective and subordinate. We further insist that it is manifestly incompatible with, and repugnant to both this right and obligation, and in manifest violation of the *treaty*, to arrest the accused, put him to trial and prosecute him on a charge of committing *another offense* subsequently to the extradition surrender, and do this while the extradition case is pending and awaiting trial to a final conclusion, and while the jurisdiction of the extradition continues supreme and exclusive over his person. There is nothing whatever in Article 3 of the convention of 1889, to authorize or sanction any such nullification of the supremacy of the extradition process and of the supremacy of the extradition jurisdiction in its exclusive authority and control *over the person of the accused*.

2. The extradition jurisdiction over the person of the accused, is special and limited; and extends no farther than the charge on which he has been extradited. It is a jurisdiction derived entirely from the *treaty;* and consequently is supreme and exclusive until it has wrought its function by se-

curing to the accused a trial to a final conclusion of the specific charge on which his extradition was granted, and he has been afforded reasonable time and opportunity after his final release on that charge, to return to the country of asylum. This is the scope of the *extradition jurisdiction* over the person of the accused, and it necessarily excludes all other jurisdiction over him, no matter what the source nor what the cause. The extradition jurisdiction is *sui generis*, and essentially different in its nature, extent and purpose from that which arises in the usual course of administering the local criminal law of the state,—an important point entirely ignored by the state courts and entirely ignored in the *dicta* of the Circuit Court expressive of its leaning in favor of the views announced by the State Supreme Court on the *habeas corpus*. This *dicta* came from Judge Van Fleet, the district judge holding the Circuit Court, who had recently been appointed to the Federal bench. Now the extradition jurisdiction has for its sole and only purpose the execution of the *treaty of extradition*. It is only by virtue of the treaty that the prosecution is possible. The treaty is both the source and measure of the authority for the prosecution;—and the only permissible prosecution against the accused is the one authorized by the *treaty*. It follows there can be no prosecution of the accused for a subsequent extraditable offense, except by special authority of a *new* extradition, where he has not put himself in default, and has not failed to avail himself of his right to return within the prescribed time, to the country of asylum. Until this supreme and paramount right

to return expires, he is absolutely protected by the *extradition jurisdiction* from all arrest, trial or detention upon any and every charge of committing a subsequent offense; and of course the nature of the offense can make no difference. Jurisdiction over the person of the accused is obtained by service of process, not by the act committed, the act constituting the crime charged against him. Until he is arrested and his person thereby made subject to the jurisdiction of the court, there can be no valid prosecution to trial and judgment. (*People* v. *Genet*, 59 N. Y., 81.) If his person is subject to the authority of another jurisdiction, and the latter, like the jurisdiction in extradition, is supreme over all the laws and judicial process of the state, it matters not what other crime is committed, the state cannot intervene nor intercept with another and different prosecution, for it cannot obtain the requisite jurisdiction over the person so long as the supreme law of the land holds jurisdiction of him for its supreme purpose. All this is self-evident. The wonder is that anyone would be found to dispute it. Let us see if there is a convenient analogy: The exclusive power and authority over matters of international extradition are vested alone in the national sovereignty of the United States, not only by express delegation in the Constitution, but by express prohibition in the same instrument against the several states exercising any similar power. Now, clearly if the United States District Court in a case within the exclusive criminal jurisdiction of the court, arrested the accused and while he was in its custody under and by virtue of its process, he com-

mitted murder within the jurisdiction of, let us say, the state of California, the latter could not invade the authority and power of the nation as represented in the process of the United States District Court and seize the prisoner and hold him on the charge of murder; but, on the contrary, must await the final termination of the Federal jurisdiction over him. Now, the international extradition jurisdiction is just as supreme over and just as exclusive of the power and authority of the state of California, as is the Federal jurisdiction in the case supposed. *The extradition jurisdiction is not the jurisdiction of the prosecuting state;* but is another jurisdiction and entirely derived exclusively from the *treaty*, though its purpose be in the concrete, to execute the international *treaty* by administering the criminal law of the state where the offense was committed, which in contemplation of the *treaty*, is the law of the United States. The situation is precisely the same as if the extradition had been for an offense against the national sovereignty of the *United States*.

Surely the state could not proceed and arrest the accused, for instance, on a charge of murder, while he was held in custody under the supreme authority of the warrant of extradition—for trial on the Federal charge. The *treaty* makes no distinction between extraditable crimes against the state and those against the United States. The treaty regards them all as crimes against the United States, for as to other countries, we are but one nation and one power. Of course if the extradition jurisdiction was merely the local jurisdiction of the pros-

ecuting state, the latter could elect whether to prosecute on one charge or another,—the *treaty* would have spent its force in merely serving to transfer the possession of the accused and would then have become *functus officio*, with no obligation resting on the receiving state to prosecute the accused on the extradition charge, and consequently no obligation to furnish him an opportunity to return to the country of asylum; nor would there be any reserved right of asylum to which he could have recourse. But such is not the nature of extradition nor of a treaty of extradition. It creates and establishes a jurisdiction *sui generis* over the person of the accused for the special and only purpose of bringing him to trial to a final conclusion on a specific charge of crime; and while in doing this it must resort to the local criminal law of the receiving state, it does not thereby *relinquish* the accused to the local criminal jurisdiction, but, on the contrary, retains to the fullest extent the supreme and exclusive authority of the international extradition over him for the very purpose of executing and enforcing the requirements of the *treaty* provision, those implied as well as those expressed, and of returning, or rather permitting, him to return to the country of asylum, detaining him no longer than reasonably necessary to give him a trial to a final conclusion on the specific charge upon which his extradition was granted, making his return thus dependent in point of time, on the result of the final trial, but returning him, that is, allowing him to return in any event either on his acquittal or after he serves his sentence, if he is convicted; but permitting no other jurisdiction on

any other charge, to interfere with the normal and consecutive course of the extradition process in the due and orderly execution of the *treaty*,—the supreme law of the land. This we trust will sufficiently explain the point we make as to the supreme and exclusive nature of the extradition jurisdiction, and that the latter will be understood as being a jurisdiction over the person of the accused, essentially and altogether different from the local criminal jurisdiction of the receiving state, and persisting in its scope and in its supreme authority, throughout the entire course of the extradition case, and until the accused has either returned within the time prescribed, to the asylum and to the protection of the laws of the country of asylum, reserved to him as an essential condition of the extradition, or has voluntarily abandoned the right. While the extradition jurisdiction extends its authority over his person, it is necessarily supreme and exclusive. Therefore no other jurisdiction on any charge other than that specified in the extradition proceedings, is possible, until *after* the final termination of the extradition case, and after the accused has been given a reasonable time and opportunity to return to the country of asylum. If by reason of his committing another offense subsequently to the extradition surrender, he thereby *forfeits* his right to return (there is no law for such a proposition, it would be manifestly preposterous, if, because he violated a subordinate law, he forfeited the rights and protection conferred upon him by the *supreme law*), and the sovereignty of the asylum is deprived of its

prerogative and of its authority to determine whether the evidence adduced justifies *prima facie* the conclusion that he did commit such subsequent offense, and forfeit the right of asylum, yet nevertheless he cannot be arrested or put to trial on the subsequent charge while the extradition jurisdiction over his person continues to exist in full force and effect; *for in right of its supremacy it is exclusive.*

3. To conserve and enforce the fundamental and paramount right to a trial to a final conclusion of the extradition case, the law of the *treaty* prohibits the arrest or trial of the accused upon any other charge, until he is first given a reasonable time and opportunity after his final release from custody or imprisonment in the case where his extradition was granted, to return to the country of asylum. This principle also maintains in exclusive and supreme control of the person of the accused, the extradition jurisdiction, until the extradition case is ended. As against all trial and prosecution while the extradition case is pending, and on a charge of committing a subsequent extraditable offense, the well settled law on the point deems the accused to be present and actually resident within the territory of the nation granting the asylum; thus necessitating a *new* extradition to authorize the subsequent trial and prosecution on the subsequent extraditable offense. There is absolutely nothing in Article 3 of the convention of 1889, that can by any possibility be construed to the contrary. It simply fails to prohibit, *and it would be very ridiculous if it did prohibit*, the prosecution for the subsequent offense. It

certainly does not authorize a prosecution for a subsequent extraditable offense, without the necessity of a *new* extradition. It does not and could not deal with the subject of subsequent offenses; it is entirely foreign in its scope and purpose to all such matters. Above all else it does not permit a trial and prosecution for the subsequent offense, *while the extradition case is pending*, and while the extradition jurisdiction extends its supreme and exclusive authority over the person of the accused; the treaty would clearly be self-stultifying and self-contradictory if it did.

4. By Section 5275 of the Revised Statutes of the United States, the extradited prisoner is invested with the legal right to a trial to a final conclusion of the charge specified in the warrant of extradition. By the same statute every prosecution against him upon any other charge, which of course includes a charge of an extraditable offense alleged to have been committed subsequently to the extradition surrender, is prohibited until at least after his final discharge from custody or imprisonment in the extradition case. The statute no more than the *treaty*, nor than the well settled principle of international law, takes any distinction whatever, between such prosecutions for subsequent offenses and such prosecutions for prior offenses; nor is it possible for any such distinction to find support in reason or authority. It can make no difference at all and is entirely irrelevant to the point, that there exists an absolute immunity as to prosecutions for prior offenses, and none as to prosecutions for subsequent offenses; in the nature of things there could

be no such immunity as to the latter class of offenses but this is an entirely and essentially different proposition from saying they can be prosecuted while the previous extradition case is pending and awaiting trial to a final conclusion, with its supreme and exclusive jurisdiction over the person of the accused, and is also an entirely and essentially different proposition from saying that the subsequent extraditable offense can be put to trial and prosecuted, without the necessity of a *new* extradition, and to thus enable the sovereignty of the country of asylum to determine whether the evidence adduced is sufficient *prima facie* to justify the further modification and abridgment of the right of asylum as to the alleged subsequent offense;—an indispensable requirement for the protection of the "sovereign right of asylum" against invasion or impairment by prosecutions on fictitious or fraudulent charges or charges entirely unfounded. Any other doctrine would open wide the door to fraud and evasion, and leave both the accused and the country of asylum without remedy.

The *Federal statute* secures to the accused, the right to return to the country of asylum within a reasonable time after his final release in the extradition case, with no exception in favor of a prosecution on a charge of committing a subsequent extraditable offense. No such exception is possible without violating the exclusive authority granted the country of asylum by the *treaty*, to determine pursuant to the treaty, whether on the evidence adduced, the right of asylum shall or shall not be again withdrawn to the extent required for the prosecu

tion of the subsequent offense; and no such exception is possible without also destroying the supreme and exclusive jurisdiction of the extradition, over the person of the accused, and making the *statute* self-contradictory and self-nullifying. The statute is by express provision of the Constitution, the supreme law of the land, and consequently excludes the application of all the laws and judicial process of the state of California, incompatible with its requirements. No one was ever more solicitous for the rights of the states than was Mr. Justice FIELD. In his opinion in *Taylor* v. *Taintor*, 16 Wall., 377, concurred in by Justices MILLER and CLIFFORD, he said:

> "The case is not essentially different from a surrender of a fugitive from justice under an extradition treaty. The United States have such treaties with several European nations, and whatever may have been the extravagant doctrines respecting the rights of the states, at one time in some parts of the country, it will not now be pretended that with the enforcement of such treaties any state, by her laws or judicial proceedings can interfere."

Section 5275 of the Revised Statutes of the United States was adopted for the sole and only purpose of carrying into effect, treaties of extradition made with foreign nations and in that behalf to specially safeguard and protect from infringement, *the rights of the accused*. Its proper construction therefore, requires that this purpose be constantly kept in view.

5. By the treaty, the statute, and the principle of international law, the extradited person is entitled as a matter of right to have his trial to a final con-

clusion, in the extradition case, *within a reasonable time.* What is a reasonable time will usually be determined by analogy to the *lex fori.* In California the period is sixty days and is held by the Supreme Court of the state to apply as much to a case where there has been a mistrial as it does to a case where no trial has taken place at all. (*Ex parte Begerow,* 133 Cal. 349.) Of course, this must be so, for the value of the right to a trial consists entirely in its being a trial to a final conclusion and *determination of the case;* especially is that true in an extradition case, where the fundamental right of the accused to return to the country of asylum depends for its enjoyment on the final termination of the case; and, consequently, any unreasonable and unnecessary postponemnt of the trial to a final conclusion is *pro tanto* an impairment and infringement of the right. If the state can postpone the trial to a final conclusion beyond the time reasonably necessary in a given case, it can postpone the trial indefinitely and perpetually, and thus deprive the accused absolutely of his right to return to the country of asylum and to the protection of its laws. Holding the accused in custody for years on the extradition charge, against his constant protest, without a trial to a final conclusion of the charge on which he was extradited, is extremely and oppressively unreasonable; and, in law, operates to terminate the jurisdiction over his person, and he is entitled to his discharge on *habeas corpus.* (*Ex parte Begerow,* 133 Cal., 349; *Hughes Crim. Law and Proc.,* Sec. 2567; *Hawley on Int. Extr.,* p. 12.) The value of the fundamental right of the accused to return to the country of asylum of necessity depends on the prosecution of the extra-

dition charge with due diligence to a final conclusion. These matters have all been fully discussed and the authorities sustaining them have been cited in the earlier part of this brief, addressed to a summary of the law pertaining to the case; and we respectfully refer in this connection to the argument and the authorities there presented in support of this important point.

6. The extradition warrant gives the sheriff of San Francisco no authority to imprison the appellant and plaintiff in error; nor has the sheriff been vested with any such power by the United States. So that, even if the warrant were now in full force and effect, the sheriff is not authorized by it to hold the custody of the accused. We have already in this brief sufficiently argued this proposition in the part addressed to the summary of the law pertaining to the various questions raised, and we respectfully refer to what is there presented in behalf of the point, repetition being unnecessary.

The argument and the authorities now to be presented will, therefore, be confined to the other four points first above stated (omitting the fifth and sixth as having been sufficiently presented),—the first branch of the argument being directed to the first three of these points, and the second branch being directed exclusively to the history and interpretation of Section 5275 of the Revised Statutes of the United States, constituting the basis of the fourth point; and there our task is done; in the earnest hope, however, that it then will have been adequately and commendably performed, in view of the dreadful and tremendous responsibility forced

upon the accused by the very grave and embarrassing necessity of defending himself against proceedings of an exceedingly destructive nature, though infamous and lawless.

In the first place, the right, the paramount and supreme right of an extradited person to a trial to a final conclusion of the charge specified in the extradition, the prohibition against his being prosecuted or tried on any other charge, and his right to "depart in peace" and return to the country of asylum at once on his acquittal or within a reasonable time after his final release in the extradition case, and free from all detention, interference, interruption or molestation, come from where it may, constitute the law of the *treaty* of 1842, generally known as the Ashburton Treaty. Therefore, the subsequent convention of 1889 does not and can not in these several particulars, afford us any additional law by way of repetition. So too although not pertinent here, as already pointed out, but yet quite erroneously suggested by the state Supreme Court as being adverse to our contention, the provisions constituting Article 3 of the convention of 1889, prohibiting a trial of the accused for any offense committed *prior* to his extradition, is by implication of law, and was so held by the Supreme Court of the United States in the *Rauscher case*, 119 U. S., 407, also the law of the Ashburton Treaty of 1842; and, therefore, we insist upon principle quite elementary it is inoperative as a part of the convention of 1889. The expression of what the law implies is of no legal effect or significance, for it is a maxim of the law that *Expressio eorum quae tacite insunt nihil oper-*

atur. The point, we may say in passing, is an answer completely refuting the contention we have heard made, that the convention of 1889 works an implied repeal of Section 5275 of the Revised Statutes of the United States, and of the Ashburton Treaty. Aside from the answer suggested, all treaties are subject to all statutes passed to carry them into effect. No provision simply declaratory of the pre-existing law, and not a revision, is ever a repeal, even if it does not repeat the entire law; it is not to be construed an implied repeal of what it does not repeat, especially when the latter pertains to an entirely different matter.

> "So far," say the Supreme Court of the United States, "as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal." (*Fong Yue Ting* v. *United States*, 149 U. S., 721.)

Taking also the rule, as very clearly laid down and applied in *Johnson* v. *Browne*, 205 U. S., 309, there is no repeal of the statute. But we started out to say that even if Article 3 of the convention of 1889 were fully operative and effective, it could not and does not in any the least degree relate to any one of the four propositions we have above stated as being the subject of the argument at this time. The article referred to is an immunity clause against prosecutions for offenses committed *prior* to the extradition and is entirely silent on the subject of subsequent offences, which latter could not, in the very nature of things by any possibility come within the scope and purview of any such clause. The clause in

question is not a provision that subsequent extraditable offenses may be prosecuted or tried, without the necessity of a *new* extradition. And it is not a provision that a prosecution for a subsequent offense can be maintained while the extradition case is pending and awaiting trial to a final conclusion, and before the expiration of the right of the accused to return to the country of asylum. Such a complete and absolute abrogation of the law of the Ashburton Treaty, and of Section 5275 of the Revised Statutes of the United States, and of a fundamental principle of international law, and of the right of asylum, by the exceedingly doubtful and disfavored method of a repeal by implication, especially where there is no conflict, is simply preposterous. Nothing can in law be derived from a treaty of extradition by way of impliedly or constructively conferring a power to proceed and prosecute the accused on a charge of committing a subsequent offense, and especially while the preceding extradition case is pending and awaiting trial to a final conclusion. The *treaty*, the supreme law of the land, does not thus stultify nor contradict itself, and defeat the very jurisdiction it has created. In any event, the power in question, as to the prosecution of subsequent offenses, cannot be taken by implication. Professor Pomeroy, speaking of treaties of extradition, says:

"Nothing is ever added by construction."
(*Pomeroy on International Law*, § 199.)

Therefore, no authority to prosecute the personextradited, and to put him on trial, upon a charge of committing a subsequent extraditable offense, without the necessity of a *new* extradition, and also to

do this while the charge on which the accused was extradited is pending and awaiting trial to a final conclusion, can be derived by implication, especially when attempted on the basis of the altogether irrelevant provisions of Article 3 of the convention of 1889. This much by way of preliminary.

Treaties of extradition proceed primarily and fundamentally on the principle that the accused has secured and been granted by another nation in right of its sovereignty, the benefit, protection and enjoyment of the "right of asylum"; and that this sovereign privilege conferred upon him is to be maintained inviolate in all cases except where the *treaty* gives authority for its abridgment, modification or temporary withdrawal; and then only to the extent permitted by the sole and exclusive purpose of the particular extradition in a given case, to wit: That the accused be accorded in due course and with due diligence, a trial to a final conclusion, of the specific charge upon which he was extradited, to the exclusion of every trial or prosecution on any different charge; and that as against trial or prosecution on any and every different charge, he is in law deemed to still remain in the territory of the nation by virtue of whose sovereignty he is *guaranteed*, as a result of the extradition, the perpetuation of the asylum and of the protection of the right of asylum, providing that he himself does not voluntarily waive the benefit of the right by failing to return within the prescribed time, and thus voluntarily abandon the asylum reserved to him. It must be constantly borne in mind that the *treaty* secures to the sovereignty of the country of asylum the exclusive power

and authority to determine from the proofs adduced, and on specific application for extradition on a subsequent extraditable offense, whether the asylum granted shall be once more temporarily abridged, modified and withdrawn; but always and in every instance for a special and restricted purpose only, and no further; with the reservation in each case, where the extradition is granted, of the absolute right to the accused to reduce to actual possession, within the prescribed time, the asylum already held by him in right, which by fiction of law he occupies constructively as fully and completely as if personally resident and physically present on the soil of the sovereignty granting the asylum, and as against every trial and prosecution on a subsequent charge of committing a subsequent offense, extraditable in character. These propositions are strongly and amply supported by eminent publicists, and by judicial decisions of distinguished courts, including the Supreme Court of the United States. There is not a case in the books to the contrary except the long ago overruled decisions of Judge Benedict and of such other but very few judges who have followed him, including, in a sense, some fugitive yet lingering expressions of Mr. Spear, predicated, no doubt, on the now exploded doctrine which in England controlled the position of the British Government in the cases of Burley and Caldwell, and subsequently formed the basis of the contention of the United States in both the Lawrence and Winslow cases,—a contention finally rejected as unsound and indefensible in principle, by the British Government, through Lord Derby in the Winslow controversy (2

Wharton's Dig. Int. Law, § 270, and pages 772, 766, 782), and by the Supreme Court of the United States in the *Rauscher case*, 119 U. S., 407, and previously by the United States District Court in *United States* v. *Watts*, 8 Sawyer, 370, as well as by the highest courts of Kentucky and Ohio in the Hawes case, and in the Vanderpool case, reported, respectively, the one in 13 Bush, 707, and the other in 39 Ohio St., 275. The views expressed by Lord Derby, strongly sustained by the argument of Lord Chancellor Cairns before the House of Lords in the Winslow case, are now conceded to be the law (1 Moore on Extradition, § 152), and are the views adopted by the Supreme Court of the United States in deciding the *Rauscher case*. They are the views upon which are predicated, in all essential particulars, the first three propositions for the maintenance of which we are contending in support of our claim that the imprisonment is in violation of the *treaty* and of international law. It is proper to pause here and state with emphasis that in England, in the Burley and Caldwell cases, and by the United States in the Lawrence and Winslow cases, it was held to be the law that a person extradited pursuant to the *treaty* could not be put to trial nor prosecuted upon any charge other than that on which his extradition was granted, *until the extradition case was first finally determined;* and that *then* he could be prosecuted on any charge, without affording him an opportunity to return to the country of asylum. This doctrine was finally rejected because it was too narrow,—not because it was not sound as far as it went in requiring that the extradition case be *first* given a

trial to a final conclusion before prosecuting the accused on any other charge, but that, on the other hand, it was erroneous and indefensible and went too far in permitting a prosecution and trial on any other charge when the extradition case was ended, by denying the right to return to the country of asylum. The whole subject will be found presented not only in Wharton's Digest of International Law, above cited, but in the volume of Foreign Relations of the United States for 1876, pages 204 to 307. The *Burley case* will also be found mentioned in detail in the opinion of the Court of Appeals of New York in *Adriance* v. *Lagrave*, 59 N. Y., 114, and in the volume of Foreign Relations of the United States just cited, pages 213, 214, 261, 262, 263, 276, 280, 284, 292, 294. The case of *Caldwell* will be found in the same volume, pages 265, 266, 276, 293. The case of *Lawrence*, and the adoption by the United States of the doctrine of the Burley and Caldwell cases, will be found at pages 229, 242 and 243 of that volume. So it will be seen that it always has been the doctrine of the United States that there can be no trial and no prosecution on a subsequent charge of committing another and different offense, *until after the final termination of the extradition case*. Since the Lawrence and Winslow cases the law of the United States has advanced and expanded,—not receded on the point; and it now prohibits a trial or prosecution of another and different charge, until *after* the accused is given a reasonable time and opportunity, subsequently to his final release in the extradition case, to return to the country of asylum and fails to avail himself of the right.

Spear, who wrote prior to the decision in the *Rauscher case*, evidently having in mind the rule referred to in the Burley, Caldwell and Lawrence cases, or one similar to it, says that *after* the extradition case is finally disposed of, the accused may then be prosecuted on a charge of committing a subsequent offense, without affording him an opportunity to return to the country of asylum. (Spear on Extradition, pp. 71, 107, 569.) He also contends that as to subsequent yet extraditable offenses the accused has no asylum reserved to him in the state granting his extradition. He recognizes the principle that:

> "For any other or different purpose than that for which the extradition is obtained, the right of asylum is not, by extradition, withdrawn from the extradited party at all."

But it is added:

> "He is, as to all other purposes, if committing no offense after his extradition, to be deemed still legally in the country from which he was extradited." (Spear on Extradition, pp. 84, 114.)

It is impossible to find the slightest support for the views stated by Mr. Spear respecting subsequent offenses and the denial of all asylum or right of asylum as to them, in any authority, ancient or modern; the authorities hereinafter cited are all to the contrary; and what he says on the point is absolutely inconsistent with his own statements of the law in various other parts of his treatise and especially with what he says as to the meaning and purpose of Section 5275 of the Revised Statutes of the United States. (See Spear on Extradition, pp. 73,

74, 80, 82, 83, 126, 205, 232, 233.) He first correctly declares there can be no prosecution or trial for the subsequent offense until *after* the final termination of the extradition case. (Spear on Extradition, pp. 71, 107, 569.) Then he says quite incorrectly and contrary to all the authorities that the commission of a subsequent offense deprives the accused of all right to return to the country of asylum; but no authority is cited and none can be cited to sustain any such a revolutionary proposition as that. He says that the right of asylum persists even after the extradition and as to all offenses except subsequent offenses, the accused is decreed to be still within the country from which he was extradited; but where does Spear get authority for the exception he specifies? He is the only writer who asserts such an exception. The authorities we cite further on in this brief are the other way. And how is the exception to be sustained? If the accused is in law deemed to be still within the territory of the country of asylum as to every charge but the one specified in the extradition, how can it be possible to make an exception of subsequent offenses? And why is he not entitled to the protection of the right of asylum against subsequent charges of subsequent offenses as he is confessedly against subsequent charges of prior offenses? Is there any greater reason for protecting him against one class of prosecutions than there is against the other? Is there not in a subsequent prosecution on a charge of committing a subsequent offense danger of fraud being perpetrated against the right of asylum and against the right to return to the country of asylum by resorting to the pretext and subterfuge of such subsequent pros-

ecution, to cut off the right of asylum? Can the sovereignty of the nation granting the asylum be deprived of the prerogative, the power and authority conferred on it by the *treaty*, in right of its sovereignty, to pass upon the evidence adduced, and determine whether there is *prima facie* proof sufficient to justify the withdrawal or abridgment of the right of asylum, upon the charge of committing the subsequent but extraditable offense? These are questions fully answered by the numerous authorities we will presently cite, directly opposed to the *ipse dixit* of Mr. Spear. It makes no difference what the subsequent charge or the subsequent prosecution, the accused is entitled to a reasonable time and opportunity after his final release on the extradition charge to return to the country of asylum, free from detention, interruption, interference or molestation; and as held by all the authorities on international law, in relation to the point, there can be no trial or prosecution on the charge of committing an offense subsequently to the extradition surrender, and of an extraditable character except upon a *new* extradition, unless, of course, the accused has failed to avail himself of his right to return to the country of asylum. In principle fundamental and authority numerous and harmonious, there is most emphatically an asylum and a right of asylum *reserved* to the extradited prisoner, against every charge and against every prosecution other than the one specified in the particular extradition proceedings; and the authorities all agree that the resulting prohibition against arresting, bringing him to trial or prosecuting him on any other or different charge, extraditable in character, is to be construed as respond-

ing to the fiction of law that as to every such charge the accused is deemed to be and remain in the country of asylum, thus necessitating a *new* extradition if he does not voluntarily waive his right to return to the asylum the law of the *treaty* has reserved for him, as a consequence of the extradition previously granted. Mr. Spear seems to be entirely oblivious of all this as being the well settled law; and does not appear to have ever read about it. The fact is undoubtedly that as in the instance of his very elaborate but futile effort to introduce into the law of interstate rendition the limitation as to trial in cases of international extradition (Spear on Extradition, pages 525 to 557), thereby overlooking the fact that the several states are not sovereign, and have no sovereign right of asylum, Mr. Spear was simply seeking and with far less plausibility to establish an erratic innovation in modification of "the right of asylum," and endeavoring to do so on no better basis than his bald, naked and exceedingly dogmatic assertion, entirely unsupported by reason or authority and in conflict with both. The doctrine expounded by Mr. Spear has a certain minor utility about it in enabling the prosecuting state to retain its hold on the accused after the final release in the extradition case, and proceed at once to prosecute him on the charge of committing a subsequent offense; and this probably appealed persuasively to Mr. Spear; but there is the danger ever present in such a case that the "right of asylum" the law of the *treaty* has reserved to the accused, may be designedly cut off and destroyed or at least impaired by a prosecution nothing more than a pretext and a subterfuge and having, as in our case,

no evidence whatever to sustain it. The doctrine in question, suggested by Spear, would certainly open wide the door to all kinds of fraud and evasion against the *treaty* and against the fundamental rights of the accused, especially his right to return to the country of asylum on his final release in the extradition case; and would deprive the sovereignty of the nation granting the right of asylum and reserving it to the accused against all charges but the one specified in the particular extradition proceedings, of the exclusive power and authority conferred by the *treaty* to determine from the evidence adduced whether on the subsequent charge of committing a subsequent offense, extraditable in character, the asylum reserved should be again modified and abridged. The right of the accused to return to the country of asylum is necessarily and inseparably consequent upon the "right of asylum" and becomes vested or absolute in every case on his final release upon the charge on which he was extradited. As well said by Judge Cooley:

> "He is in the state by compulsion upon a single accusation. He has the right to have this disposed of and then to depart in peace."

Mr. Spear's attempt to divorce the fundamental right to return or revert to the asylum *reserved*, from the right to a trial of the extradition case to a final conclusion, having nothing to sustain it but his *ipse dixit* and being contrary alike to both reason and authority, must necessarily fail. We notice he makes no suggestion that the exception he asserts can by any possibility be engrafted on Section 5275 of the Revised Statutes of the United States. In any event, the construction placed upon

that statute, since Mr. Spear invented his exception, by the decision in the *Rauscher case,* very effectually disposes of and removes his *ipse dixit* by means of which he sought to abolish the right of the accused to return to the country of asylum on his final release in the extradition case, in all instances where he is charged, just simply *charged* with committing a subsequent offense; that is what his position amounts to.

The extradition is never absolute; it is never merely a transfer of the accused, from one jurisdiction to another, to be dealt with by the receiving state *ad libitum,* and as fully and completely as if there had been no extradition at all, and no departure from the prosecuting state. It is invariably and necessarily a special transfer for a special and limited purpose with a reversion to the country of asylum when that purpose is ended. *It follows that the jurisdiction of the extradition is supreme and exclusive.* The extradition is both the source and the measure of the jurisdiction over the person of the accused, for the purpose of trial and prosecution on a criminal charge; beyond that the prosecuting state cannot go, without violating the *treaty.* Without the extradition there could be no trial or prosecution of the accused; with it, there can only be the trial and prosecution which it specially authorizes. No matter how much it may be a great convenience to the prosecuting state in the pursuit of vengeance, to discontinue and drop the extradition charge, substituting another and entirely different charge in its stead, the law of the *treaty,* the supreme law of the land, emphatically and absolutely forbids it. Treaties are not to be disregarded

simply because convenience or even an accommodating notion of substantial justice may seemingly demand it. To again quote Mr. Justice Story:

> "This court is bound to give effect to the stipulations of a treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions and requirements of the treaty or take away any qualification or integral part upon any notion of equity or general convenience or substantial justice." (*The Isabella*, 6 Wheat., 72.)

And in a recent case of international extradition it was forcibly said by the Supreme Court of the United States that while, of course, the escape of criminals is much to be deprecated, it is still of the utmost importance that the *treaty* obligations be kept in the highest good faith and that the custody of the accused acquired for one purpose and on one charge be not taken advantage of nor used by the receiving state, to prosecute him for another and different purpose and on another and different charge. (*Johnson* v. *Browne*, 205 U. S., 309.) In all things the state must proceed according to law; and if it comes to the question whether criminals should escape or the law be violated or perverted or overthrown in order to hold them, no self-respecting court or judge, recognizing a plain and manifest duty, will hesitate an instant to uphold and maintain the law and release the criminals. No crime can approach in atrocity the assaults made on organized government by overthrowing the law. We certainly cannot do better than to quote in this connection the eloquent argument of Lord Chancellor Cairns in the case of Winslow, before the House of Lords. He there said:

"The noble earl spoke the other night of those men as murderers, robbers and rogues, and for all I know they may be what he describes them to be, although the tenderness of our law assumes that a person is innocent until he is proved to be guilty. But be that as it may, I can conceive nothing more dangerous than to bring down a great and important principle to the level of the merits or demerits of the individual in whose case that principle is brought in question. That is not the way in which we act in this country with regard to our criminal law, on the great principles of which, and on the cardinal rules of evidence, we all depend for our lives and liberties. If in a particular case we were to overstrain or overthrow those great principles and those rules, the evil which we would have done would be sure to come back upon us in some great political prosecution, or some trial of a man against whom an unjust and violent prejudice happened to have arisen in the public mind. So it is with regard to this question of extradition. There are some words that fell on the subject from a great master of history, which are the words not only of a historian, but of a philosopher, and which I should like to read to your lordship. He says: 'We are ever too ready, when it is the redress of our own injuries that is in question, to strain and compromise those general laws to which we have all to look for protection in the time of our adversity; and thus, when the day of trial comes, we find those laws no longer in existence.'" (Foreign Rel., U. S., 1876, p. 296.)

We have made special reference to this feature of the case because in both the opinion of the state Supreme Court and in that of the federal district judge is the expression of a fear lest the criminal escape if the law were upheld. No such consideration should ever be permitted to influence the judi-

cial mind. There is a higher law based upon higher sentiments both of governmental polity and national sovereignty, giving just and paramount recognition to the *sovereign right of asylum;* and it is this law that all courts and judges must obey, instead of heeding the fears worthy of no better authority than the dignity of a policeman's functions.

VIII.

CITATION OF ADDITIONAL AUTHORITIES IN SUPPORT OF THE POINTS MADE.

We will now proceed in regular course to further present the numerous authorities fully sustaining our contention on all the points we have made in this brief in support of our claim that our imprisonment is in violation of the *treaty* and of international law. We will then next present the points and authorities in relation to the history and interpretation of Section 5275 of the Revised Statutes of the United States, which statute in and of itself amply sustains our position in all respects, and then we will conclude the brief as well as the argument, feeling assured that whatever else may be said, we have made both the brief and the argument sufficiently comprehensive and complete to include every conceivable phase of the points raised and of the questions presented.

Anciently, it seems, the sovereign doctrine of right of asylum was so highly and reverently esteemed that it was assigned to the special favor and protection of the national gods. *Heffter*, at page 146 of his work on International Law, tells us that

originally extradition was not permitted, "the fugitives invoking the protection of the national gods." And we know that at common law extradition was very strongly denied recognition. Mr. Lawrence, an eminent authority on international law, in the fourth volume of his commentaries on Wheaton's Les Elements Du Droit International, page 368, says:

> "The extradition by a country of its citizens and also of foreigners who are refugees therein, confident in the right of asylum, a right which is an inviolable attribute of all independent sovereignty, has no place in the common law, upon which the American and English have always relied for the protection of their persons, their liberty and their property."

And at page 371 he says:

> "Lord Coke pronounces himself energetically against extradition. He says: 'It is upheld and it has been decided that kingdoms divided under several kings, in league one with the other, are sanctuaries for the servants or subjects fleeing for their security from one kingdom into another and must not according to the laws and the liberties of kingdoms be delivered; and this is founded upon the law of Deuteronomy: *Non tractes domino suo servius, qui ad te confugerit.*'"

In an article written by Mr. Lawrence and published in 14 Albany Law Journal, page 88, he says:

> "We find in Lord Coke's Third Institute the strongest denunciation against the surrender of either citizens or strangers to foreign states to be punished according to their laws, with or without treaty. He instances no adjudged case, but cites some which show how strong in his time, both in England and on the continent, was the feeling that 'all kingdoms were free to

> fugitives, and that it was the duty of kings to defend every one of the liberties of their own kingdoms, and, therefore, to protect them.' 3 Institutes, 180."

The same sanctity of the right of asylum is maintained by international law. Says *Heffter:*

> "All independent states offer on their territory a natural asylum not only to their own subjects, but also to foreigners, as to the prosecutions coming from other nations against them." (Heffter, Droit International, par. Geffeken, p. 145.)

And Twiss says that treaties of extradition are *stricti juris*, "and in exception to the common law of nations." (Twiss on the Law of Nations, § 223.) It follows that the asylum granted is only abridged in extradition cases, to the limited extent of the particular charge specified in the warrant of extradition *and no further;* and that in all other respects this asylum remains and is reserved to the accused as a result of the extradition, and precisely as already explained, against every charge and every prosecution other than expressly authorized by the extradition process in the special case. In contemplation of law the extradited person still remains in the country of asylum and under the protection of its sovereignty, as against every charge and every prosecution not covered by the particular extradition; and this in law effectually prevents a trial and prosecution for an extraditable offense alleged to have been committed subsequently to the extradition surrender, except upon and by authority of a *new* extradition. The extradition is never a general relinquishing or surrender of the acquired asylum. It is at most but a temporary modification or abridg-

ment; and extends no further than the prosecution of the charge specified in the extradition proceedings. Therefore, a state cannot take advantage of the presence of the extradited person, and prosecute him on a charge *different* from that stated in the extradition process.

Lawrence quotes approvingly the following pertinent excerpt from the treatise of *Fiore* on International Law:

> "If after the extradition is obtained, a *new* crime is discovered, a *new* demand of extradition must be made and accorded before the person extradited can be prosecuted or punished for the *new* crime." (Lawrence's Com. sur Wheaton, Vol. 4, p. 507.)

In an article published in the Albany Law Journal, Vol. 16, page 363, Mr. Lawrence says:

> "When the extradition of an individual is granted by one nation to another, the protection of the foreign asylum to the accused party is only impaired to the extent expressed in the warrant, and that, for the cases not excepted or provided for in the convention, and for all other purposes, the person surrendered is to be deemed still legally in the country from which he was extradited; or, as stated in a recent treatise on extradition, 'the fiction according to which, for every fact foreign to the extradition, he is still in the territory of the country of refuge, must be completely respected; and if an offense is brought to notice in the course of the proceedings the results must be the same.' Vazelhas Etudes d'Extradition, page 155."

The articles of Mr. Lawrence in the Albany Law Journal are strongly approved by the Supreme Court of the United States in the *Rauscher Case*.

In the second volume of his work on extradition, page 1042, Professor Moore says:

> "In strict law every independent nation has the right to afford asylum to fugitive offenders and to refuse to deliver them up. This right it must be supposed to maintain except in so far as it sees fit to forego it. This it may do either in the exercise of comity or by placing itself under the obligation of a treaty. But, in whichever way it may be secured, the particular concession is not held to have the effect of a general abandonment of the right. Hence, if a nation agrees by treaty to extradite fugitives for certain offenses, it abridges its asylum only in respect to those offenses, and if, under its obligation to surrender, it delivers a fugitive up, it deprives him of asylum only as to the offense for which it is shown that his extradition is due, and surrenders him to be tried for that offense and for no other. As to other offenses, he is to be considered as being still within the state from which he was taken, and as being entitled to return to that state before being tried for any such offense."

That is to say, he must be again extradited pursuant to the terms and conditions of the *treaty*.

Lord Chancellor Cairns, in his argument before the House of Lords in the Winslow case, states the principle in the following terms, quoting from authority:

> "The extradition declares the offense which leads to it, and this offense alone ought to be inquired into. So that if during the prosecution for the crime which has led to the extradition there should arise the evidence of a new crime, a new demand of extradition ought to be made." (Foreign Rel. U. S., 1876, p. 287.)

Lord Derby expressed the same principle in very explicit language. He said:

"We contend that a person who has taken refuge in England, and has been surrendered after certain legal proceedings, for the purpose of being tried on a specific charge, *is only lent*, so to speak, to the government which claims him, for the purposes of that trial; and if, upon the charge so brought, he is not found guilty, then we say he is entitled to his freedom, and cannot be claimed again, except after a repetition of the preliminary inquiry which is necessary before extradition is granted, which, of course, implies that he must have an opportunity of returning to England." (Foreign Rel. U. S. 1876, p. 278.)

And he also said, replying to the contention of the United States, which is likewise the position taken by the California authorities as to the appellant and plaintiff in error, that the extradited person once in the possession of the prosecuting state, could be dealt with subject to no restraint except that which is imposed by its own laws,

"that this is contrary to the general spirit and intention of the treaty; contrary to what has always been understood as the practice; contrary, also, to the principles laid down both by the British Parliament and the American Congress. We contend that the government surrendering an accused person does so only after having satisfied itself by means of a judicial inquiry that there is a reasonable *prima facie* case which justifies the putting him on his trial; —just as no man can be tried here without first being committed by a magistrate, or, in some cases, without a true bill being found against him. It is also necessary that it should be shown to the satisfaction of the magistrate so committing the person for extradition that the offense of which he is charged is included among extradition offenses, and is not political in its character. Now, we say that both these safe-

guards are absolutely done away with if it is understood that a man extradited for one offense can be tried for another without a fresh extradition being made. A man is charged, say, with forgery. Extradition is granted. He is tried in America and acquitted." (We were not given a trial to a conclusion at all.) "It is clear that if all the facts which came out on the trial had been known to the committing magistrate he would not have been extradited at all on that charge. What right, then, has the state, which has only got hold of him as presumably guilty of that offense, to deal with him on another charge in a way that they could not have done if he had not been in the first instance unjustly accused? They are, in such a case as I have supposed—I use the phrase in a legal and not in a moral sense—taking advantage of their own wrong." (Foreign Rel. U. S., 1876, p. 279.)

Both Lawrence and Moore agree that the work of *Billot* on the law of extradition is a classic and a standard authority on the subject. They speak of it in very high terms (1 Moore on Extradition, Sec. 155, note). Now, Billot cites the authority of Faustin-Helie, Legravesend, Trebutien, Bertauld, Le Sellyer, Morin, Mangin, Foelix et Demangeat, Brouchoud, Ducrocq, Blondel, Bonafos, Kluit, Hefftter and Duverdy, saying:

"They all recognize that an extradited person cannot be tried for anything else but the infraction for which his extradition has been granted. Here is a rule established as firmly as possible. It is incontestable that the tribunals can try the accused only on the facts for which the extradition has been accorded. This rule is an immediate corollary from the principle which imposes on the judiciary power an obligation to apply the treaties of extradition, —a principle which itself is a direct conse-

quence of the higher principle of the separation of powers. The rule and the principle belong to the very organization of political societies *and must have precedence over every internal law* (italics ours). It is, besides, a condition *sine qua non* of the very principle of extradition." Billot Traite de L'Extradition, p. 308.)

And with great accuracy and precision he further says (page 313):

"The engagements taken by a government not to permit the extradited to be tried on any charge but the one on which his extradition was granted must be interpreted in this sense—that he shall be considered absent respecting all prosecutions for infractions not covered by the extradition."

How then can it be contended that subsequent offenses are an exception? They clearly are within the reason and purpose of the prohibition; then why should they be excepted?

No writer on international law has even intimated that any such an exception is possible; this alone should be and is conclusive against it. Is it supposable that if there existed any such exception it would not be mentioned by such eminent authorities as *Billot, Lawrence, Heffter* or *Fiore*, or by at least one of the many writers on international law? Or is it possible that if the exception ever existed that we would find the Institute of International Law, at its session in Oxford, formally adopting some twenty-six resolutions,—a sort of code on the law of extradition, and asserting the prohibition against prosecution on any but the extradition charge, without discovering that there was an exception in favor of prosecuting the accused on a charge of committing

an offense subsequently to the extradition surrender? On the contrary, we find the Institute adopting a resolution (No. 22) indicating very clearly the absence of the exception in question, especially when the resolution is read in its relation to another resolution immediately following (No. 23). The first resolution, Number 22, is in these words:

> "The government which has obtained an extradition for a determinate act is lawfully (*de plein droit*), except where there is a convention to the contrary, obliged not to permit the person so extradited to be tried or punished except for this act."

We have already seen that it is the law that the power to prosecute on a charge of committing a subsequent offense, cannot be taken by implication. If there was an exception to the rule stated in the twenty-second resolution of the Institute surely it would have been specified. However, the next resolution sets the matter at rest, and indicates very persuasively that no exception exists in favor of prosecutions on charges of subsequent offenses. The twenty-third resolution is as follows:

> "The government which has granted an extradition may thereafter consent that the person extradited be tried for acts other than the one which was the basis of his being sent back, provided that these acts can be the basis for extradition." (*Annuaire* V, p. 332.)

The evident purpose of this resolution is to dispense with the necessity of according the accused his right to return, but still securing and maintaining the exclusive prerogative of the country of asylum in right of its sovereignty to first determine whether any further or other prosecution shall be

permitted, and requiring the other charge to be of an offense extraditable in character. The proposition constituting resolution twenty-three could only be made effective by treaty stipulation, with proper provision affording the accused an opportunity to be heard. In a recent work on international law the action of the Institute, to which reference is above made, is cited, the author saying:

> "It must be emphasized that, according to *all* extradition treaties, it is a condition that the extradited individual shall be tried and punished for those crimes *exclusively* for which his extradition has been asked and granted" (italics ours). 1 Oppenheim on International Law, Sec. 332.

This, of course, is also adverse to any prosecution on any other charge, while the extradition case is pending and awaiting trial to a final conclusion. Indeed, there is not an authority in existence to sustain the action of the State of California in prosecuting the appellant and plaintiff in error upon a *different charge*, while the extradition case was pending and awaiting trial to a final conclusion, and while he was held by virtue of the supreme and exclusive jurisdiction of the extradition. It is a palpable case of using the extradition custody of the accused for a purpose not authorized by the *treaty*. This has always been considered to be fraudulent conduct. It is obtaining the custody on the faith of the obligation to first comply with the requirements of the treaty, and then taking advantage of the confidence reposed by the country of asylum, to use the custody acquired for a purpose entirely different from that prescribed by the *treaty*, and

which would not have been possible but for the extradition obtained by reason of the treaty. Say the Supreme Court of the United States:

> "The general scope of the two treaties makes manifest an intention to prevent a state from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then, having obtained possession of his person, to use it for another and different purpose." (*Johnson* v. *Browne*, 205 U. S., 309.)

Why this does not strongly apply to a trial and prosecution of the accused on a subsequent charge, while the extradition case is pending and awaiting trial to a final conclusion, to wit, a charge of committing an offense subsequently to the extradition surrender, is a question the state courts of California and the Federal district judge have not made the slightest attempt to answer. If the law is to yield to their expressed fears that the accused might escape if allowed the opportunity to avail himself of his legal right to return to the country of asylum, then manifestly the remedy is not in depriving the accused of his supreme right to a trial of the extradition case to a final conclusion, and invading the supremacy of the extradition jurisdiction, using his custody for a purpose different from that on the faith of which his extradition was obtained, but on the contrary why not concede him his right to a trial to a final conclusion, and within a reasonable time, on the charge upon which he was extradited, and to the exclusion of every different charge, and *then* having at least to that extent obeyed the law of the treaty, the supreme law of the land, they can in this way ameliorate their subsequent violation

of the law, in depriving the accused of his legal right to return to the country of asylum, and go ahead and prosecute him on the subsequent charge of committing a subsequent offense, and do this without incurring the least danger of the accused escaping from their clutches and destroying by his escape the foundations of the government, bringing anarchy and desolation to feast on the ruins, and, feasting, revel in chaos.

In any event the principle is still and must ever continue to be that under the *treaty* the accused can only, in the first instance, be prosecuted and put on trial upon the specific charge on which he has been extradited; in no other way can the obligations imposed by the treaty be fulfilled; and this of course excludes trial and prosecution on a charge of an alleged subsequent offense. *Heffter* very forcibly says:

> "The individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes, would be to violate the mutual principle of asylum and the silent clause contained by implication in every extradition." (Heffter Droit International, par Geffcken, p. 150.)

We cannot too strongly emphasize the point that this doctrine of international law has for its sole and only purpose the conserving and protection of the three fundamental rights, all derived from the treaty;—the right of asylum; the right in that behalf to a trial to a final conclusion of the extradition charge, and the right to return to the country of asylum on final release from custody or im-

prisonment on the charge specified and described in the extradition proceedings, by acquittal or otherwise; these rights re-enforced by the prohibition against a trial on any other charge manifest the solicitous care and indicate the strong safeguards with which the law has protected and does protect the *right of asylum* reserved to the accused by the *treaty* and by the federal statute. The value of the "right of asylum" consists entirely in its actual enjoyment; to unnecessarily deprive the accused of its benefit, when entitled on the termination of the extradition case, is to deny him the right itself. So, too. postponing unnecessarily or unlawfully the final disposition of the extradition case is depriving him *pro tanto* of the benefit of the right of asylum and of the benefit of his right to return to the country of asylum. Unlawfully postponing the enjoyment of a right is tantamount to a corresponding denial and deprivation of the right. *The law of the treaty and of Section* 5275 *of the Revised Statutes of the United States requires that the extradition case be prosecuted with due diligence to a final conclusion, and to the exclusion of every charge other than the one designated in the warrant of extradition.* The right to return to the asylum cannot be forfeited until it has actually *vested;* and besides this, there is no law declaring a forfeiture; we have no bills of attainder, nor *ex post facto* laws. We have already said, and repeat it, that it would be manifestly preposterous. if, because the accused violated a subordinate law, he forfeited the rights and protection conferred upon him by the supreme law. Says Spear, who, at least

in this particular, is fully sustained by both principle and authority:

> "It is to be remembered that each government assumes, as its starting point, in making an extradition treaty, that every person within its jurisdiction, and not violating its laws, is entitled, as against all the world, to the *prima facie* right of undisturbed and protected asylum. Now, neither government agrees to a withdrawal of this right in respect to any accused party, and neither agrees to place that party in the custody of the other, except upon specified conditions distinctly stated in the treaty, and for a purpose as distinctly stated in the proceedings required by the treaty; and hence it is simply monstrous to assume that these conditions and this purpose are operative only for securing the surrender, and absolutely of no effect the moment the surrender has been actually obtained." (Spear on Extradition, p. 205.)

The same writer quotes approvingly the following from *Wharton's Criminal Law, 7th Ed.,* Vol. 3, page 34:

> "The sole object of extradition is to secure the presence of the fugitive in the demanding state for the purpose of trying him for a specified crime. The process is not to be used for the purpose of subjecting him collaterally to a criminal prosecution other than that specified in the demand." (Spear on Extradition, p. 71.)

Lord Chancellor Cairns in his argument before the House of Lords in the Winslow case, after citing the authorities and quoting from them, says:

> "Now, my lords, I think these authorities, and they might be multiplied, will satisfy your lordships that, apart altogether from the wording of treaties there is a silent and implied condition in extradition that the crime for which

> the surrender of a man is asked must be specified, and that it is for that crime alone that he must be tried. I am absolutely unaware of any authority who has ever written the other way. * * * What is the object of specifying one offense, and being made the judge of the evidence with regard to it, if, after his trial for it, which may be a mere formality and result in an acquittal and show that he ought never to have been accused of that offense at all, he may be tried in the country to which he is surrendered for any other offense they may please to lay at his door?" (For. Rel. U. S., 1876, p. 289.)

And Lord Derby in a note to the representative of the United States says:

> "The true meaning of the treaty is that a person accused of a specified crime or crimes shall be delivered up to be tried for the crime or crimes of which he is accused, and an agreement between two powers that the right of asylum, equally valued by both, shall be withdrawn only in respect of certain specified offenses implies, as plainly as if it were expressed in distinct words, that in respect to the offense or offenses laid to his charge, and such offense or offenses only, is the right of asylum so withdrawn." (Foreign Rel. U. S., 1876, p. 259.)

And in an earlier note he says, with equal fidelity to the established principles of international law, pertaining to the subject:

> "Her Majesty's government believe that the only safeguard for the liberty of the individual and the maintenance of the right of asylum are to be found in the principle for which they contend, that the crime or crimes of which a man is accused in the country surrendering, which are proved against him there, and for which he is surrendered, are the only crimes for which he ought to be tried in the country claiming." (Foreign Rel. U. S., 1876, p. 227.)

It is now universally agreed that these views of Lord Chancellor Cairns and of Lord Derby correctly state the law. We present the following excerpts from the articles of Mr. Lawrence, published in the Albany Law Journal:

> "The essential principles of extradition, as presented by England, are that a person can be tried for no offense except the one for which he is surrendered. This is the proper construction of the treaty of 1842." (14 Albany Law Journal, p. 85.)
>
> "The fact that a person is extradited only for the crime that has been *prima facie* proved against him, shows that the treaty would be evaded if he was tried for another offense included in the extradition treaty, or even for one of the same character, provided it was not the identical case for which the proofs were adduced and to which they are applicable." (14 Albany Law Journal, p. 90.)

Again:

> "I have found no American treaty which provides in terms that the extradited individual shall not be tried for any offense for which he was not extradited. This may be owing to its being supposed to be provided for by the law of nations, as well as to the fact that a cession of one privilege does not carry with it universal jurisdiction, nor require that such jurisdiction be expressly negatived as to everything else." (14 Albany Law Journal, p. 93.)

At page 94 he approves Billot's statement of the law, which has been heretofore quoted in this brief. In a very learned and exhaustive treatise on extradition, of which Dr. Bernard is the author, it is said:

> "Mr. Billot is of the opinion that the judicial power must not proceed to try the extradited person, where a new crime is discovered since

> the extradition. This means it cannot be done except by opening negotiations, so as to obtain an extension of the extradition." (Bernard Traité de L'Extradition, Vol. 2, p. 516.)

With us, this can only be done by means of a new extradition. The same distinguished writer says:

> "The extradited person must not be tried on any charge but the one for the infraction which constitutes the object of the extradition. This principle is founded on the right of sovereignty of the country of asylum." (2 Bernard Traité de L'Extradition, p. 483. See, also, pp. 493, 510, 670.)

When he says that the principle confining the trial and prosecution to the extradition charge "is founded on the right of sovereignty of the country of asylum," the meaning is that it is this country which in right of its sovereignty has *reserved* to the accused, on his extradition, the asylum he previously acquired, with the implied guaranty in the treaty that he should be restored to that asylum, if he so elect, upon the final termination in his favor of the extradition charge, or on the serving of his sentence if convicted on that charge.

Judge Cooley in an article published in the Princeton Review, January, 1879, speaking of the legal *status* of the person extradited, says:

> "He is within the state by compulsion of law upon a single accusation. He has a right to have that disposed of, and then to depart in peace."

The same view of the law, in substantially the same terms was expressed by the Supreme Court of the United States in *Cosgrove* v. *Winney*, 174 U. S., 64, 69. Now, the question is, can the state

interpose its subordinate and inferior authority by means of a criminal prosecution on a charge of committing a subsequent offense of an extraditable character, and thereby "check" or hold "in check" the prosecution of the extradition case or the supremacy and control of the extradition jurisdiction? We have already in this brief established the point that the extradition jurisdiction over the person of the accused is *supreme and exclusive*, and also discussed the meaning of the phrase "supreme law of the land," especially as to the effect on all the laws and judicial process of the state and we have quoted from Billot the declaration that the extradition jurisdiction and the extradition process take precedence over all municipal laws. This would certainly seem to fully answer the question, and it does; but we will also cite Lawrence on the point. He says:

> "The treaties are obligatory on the component states as well as upon the nation. They control the law, the power of the legislature and the power of the judiciary, in the sense that an interior law cannot hold in check a stipulation of a regular treaty." (Lawrence Com. sur Wheaton, Vol. 4, p. 503.)

On the principal question we have also the authority of Judge Gresham, who, while secretary of state, said:

> "With the idea of compulsory prosecution in view, it is laid down as a general rule, not merely that a person delivered up shall not be tried for an offense other than that for which he was surrendered, but that he shall not be so tried until he shall have had an opportunity to return to the jurisdiction of the surrendering government. This is the construction given by writers to the limitation as to trial, whether the

> limitation be expressed in terms thus comprehensive or in terms more brief." (Foreign Rel. U. S., 1895, p. 492.)

It would clearly be a fraud on the treaty and on the accused to extradite him, and then not prosecute him to a conclusion on the extradition charge; especially to imprison him for three years and more, without trial determinative of the case. The fraud is greatly intensified and aggravated by prosecuting him on another and different charge to final sentence for a term of fourteen years. It is the *equivalent* of securing possession of his person by false and fraudulent pretenses, with the ulterior design to use the extradition custody for an altogether different purpose than that represented, and for which, and upon the faith of which representation the country of asylum entrusted his possession to the demanding state. No such chicanery and fraud are sanctioned by international law, and it is a matter of no little surprise that any court could be found to endorse or sustain it. The accused, who has suffered in consequence, must be expected to vigorously and justly resent it rather than commend it. In contending against despotism, it is not reasonable to expect the victim to speak of it in respectful terms of conciliation; and we say that what the State of California has done in this case is, when measured by law, nothing else but *despotism;* and none the less so because its courts have upheld it.

There is one other text book we desire to cite. It is that of *Andrew's American Law,* an edition of this year (1908). It is there said:

> "The specific crime must be made to appear, for it is a rule that one extradited cannot be

> tried for any other crime than that charged in the extradition proceedings, at least until that crime has been prosecuted, and if an acquittal follows, the accused is given an opportunity to depart." (2 Andrew's American Law, § 910.)

In his Digest on International Law, Volume 2, page 798, Wharton says:

> "As a matter of international law, the defendant should only be tried for the offense for which he is extradited."

In Hawley on International Extradition, page 8, he says:

> "A fugitive who has been surrendered to the United States under an extradition treaty cannot be tried for other offenses than those named in the warrant of extradition."

The Parliament of Canada in 1889 declared it to be the principle of international extradition that:

> "This act shall not authorize the issue of a warrant of extradition of any person under the provisions of this statute, to any state or country in which, by the law in force in such state or country, such person may be tried after such extradition for any other offense than that for which he has been extradited, unless an assurance shall first have been given by the executive authority of such state or country that the person whose extradition has been claimed shall not be tried for any offense than that on account of which such extradition has been claimed."

This is Section 5 of the Act of 1889, and it is an official declaration by the highest authority in Canada of the principle of international law for which we are contending. Clarke, in a note at page 259

of the fourth edition of his work on Extradition, speaking of this Act of 1889, says that it is:

"a short but very well drawn act."

And at page 241 he says:

"In Canada the practice is regulated by the Act of 1886 (49 Vict. c., 142), supplemented by the Act of 1889 (52 Vict. c., 36)."

We have referred to the Act of 1889 simply for the purpose of showing that Canada has, through its Parliament, adopted the principle of international law laid down by the authorities we have cited, and has not made any exception in favor of a trial or prosecution on a subsequent charge of committing a subsequent offense.

IX.

FURTHER CITATION OF AUTHORITIES. REVIEW OF OPINION OF STATE SUPREME COURT. THE RAUSCHER CASE.

Having cited and quoted from treatises of recognized and distinguished authority, including the views of eminent jurists and publicists, fully sustaining our position and fully sustaining the points we raise, it is our purpose to now present the decided cases where the principles and doctrines on which we rely have been announced and followed as the basis of the court's judgment; incidentally we will compare and review the opinion delivered in our case by the Supreme Court of California, which proceeds on no principle or doctrine of international law, and rests upon no precedent, but is contrary to both principle and authority—a proposition self-

evident when one stops and ascertains the conclusion at which the court arrived.

In the first place, and by way of preface, we desire to point out that the value of a judicial decision as a precedent, is in the *principle* of the law, which the court applied in determining the question or questions raised, and not in the parallelism of special and adventitious facts. Our system of jurisprudence is not built upon single instances in endless repetition, but on principles, rules and doctrines of the law. Says Lord Coke:

> "The law consists not in particular instances and precedents, but in the reason of the law, and *ubi eadem ratio idem jus;* for reason is the life of the law; nay, the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason." (Co. Litt., 97b.)

Now, what is the reason of the principle we invoke? Manifestly in order to conserve and maintain the "sovereign right of asylum," that the accused be secured his supreme right to a trial within a reasonable time, of the extradition charge, to the exclusion of any and every different charge, and this in protection of his right to return to the country of asylum, on his acquittal or other final release in the extradition case. In other words, the ultimate purpose is to secure to him the benefit and protection of the "sovereign right of asylum," which the *treaty* by necessary implication has reserved to him as a condition of his extradition against every charge and prosecution for an offense not within the particular extradition, thus necessitating as to subse-

quent offenses of an extraditable character, a *new* extradition, and thereby preserving and enforcing the sovereign prerogative of the country of asylum to determine from the evidence adduced whether the protection of the asylum reserved for the benefit of the accused, shall again be temporarily withdrawn and abridged for the purpose of a trial and prosecution on the subsequent charge of committing a subsequent offense. The exception contended for, in favor of prosecuting subsequent offenses or rather *charges* of commission of subsequent offenses extraditable in character, without a new extradition and to the exclusion of the then pending extradition case, is evolved and set up by the state of California in the most absolute subversion of the *treaty* and of the rights, obligations and the indispensable conditions which the treaty prescribed, and to which it gives rise. It is an exception that is simply impossible; its existence would be *destructive* of the supreme right of the accused to a trial to a final conclusion of the charge on which he was extradited; *destructive* of his supreme right to return to the country of asylum, on his acquittal or other final release on the termination of the extradition case, and to so return, without detention, interruption or molestation, come from what source it may, in other words, his right to have the extradition case disposed of and then "to depart in peace;" *destructive* of the sovereign prerogative of the country of asylum to determine from the evidence adduced whether the "right of asylum" should be again temporarily abridged and modified so as to authorize by a new extradition, the prosecution of

the accused on the charge of committing an extraditable offense, subsequently to the preceding extradition surrender; *destructive* of the implied prohibition of the treaty and of Section 5275 of the Revised Statutes of the United States against his being tried or prosecuted on a charge different from the one specified and described in the extradition proceedings; and finally, *destructive* of the right of asylum extended and reserved to him by the sovereignty of another nation, and only modified and abridged temporarily, for the purpose of criminal prosecution, to the special and limited extent of the specific charge designated in, and covered by the particular extradition. It is not therefore to be wondered that no publicist and no court have ever discovered nor suggested the existence of any such annihilating exception as that invoked and relied upon in our case by the state of California. So destructive is the exception set up by the state authorities, that it absolutely annihilates and wipes out completely the supremacy and indeed the very existence itself, of the extradition jurisdiction, and substitutes the local criminal jurisdiction of the prosecuting state as fully and extensively to all intents and purposes as if there had been no extradition at all. The doctrine asserted by the state authorities and those aiding and abetting them is precisely nothing but a gross exaggeration of the one now long since exploded, that when once a man is extradited and brought within the territory of the prosecuting state, the latter is entitled to deal with him, subject to no restraint except such as may be imposed by its own laws. This is the very same

doctrine, quite forcibly condemned and rejected as being palpably unsound and indefensible, by the Supreme Court of the United States in the *Rauscher case.* The court say:

> "It is unreasonable that the country of asylum should be expected to deliver up such person to be dealt with by the demanding government, without any limitations implied or otherwise, upon its prosecution of the party."

And speaking of the implied limitations derived from the *treaty,* the court further say:

> "It is therefore very clear that this treaty did not intend to depart in this respect from the recognized public law, which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty." (And of course for the one alone, on which his extradition was granted.) "If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offense is charged to have been committed, there is very little use for this particularity in charging a specific offense, requiring that offense to be one mentioned in the treaty as well as sufficient evidence of the party's guilt to put him upon trial for it. For can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the state which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offense, free from all the positive requirements and just implications of the treaty under which the transfer of his per-

son takes place? A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which the law governing that proceeding was intended to secure. If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them."

And after an exhaustive review of the authorities, with the purpose in view of ascertaining the true principles and doctrines of the law governing the question, and that, too, mark you, *in a case where pending the final termination of the extradition charge, the accused was prosecuted to conviction on a charge other and different from the one on which he was extradited* (that precisely being also our case), the Supreme Court of the United States, adhering to the principle declared by the authorities on international law, stated carefully and with great

precision, nd as being without qualification or exception in favor of prosecutions for alleged subsequent offenses, the law of this country to be as follows, and made no attempt to limit it to "prior offenses;" for manifestly, if it applies to prior offenses, it must in reason and in common sense necessarily apply to subsequent offenses. It is the arrest and trial on the *different* charge, and the fact of a *different* prosecution than authorized by the extradition, that for reasons strongly applicable to subsequent offenses the principle prohibits;—and not that the trial on the different charge of committing a subsequent offense, and the different prosecution on such a charge, while the extradition case is pending, is any the less a prosecution *different* from the one specified in and the basis of the extradition than would be such a prosecution for a prior offense. The court then lay down the *principle*, in the following explicit terms:

> "Upon a review of these decisions of the federal and state courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."

This, it is manifest, is the very *principle* for which we are contending, and it recognizes to the full extent the well settled doctrines of international law, concerning the "sovereign right of asylum," the special and limited nature of the extradition as being simply a temporary abridgment of the asylum acquired; and the reservation or reversion in favor of the accused of the "sovereign right of asylum" as against all other charges and prosecutions not within the authority of the particular extradition, and therein his right "to return to the country from whose asylum he had been forcibly taken" under the extradition proceedings, when he is finally released from custody or imprisonment, on the charge upon which he was extradited. We repeat: It is the arrest and trial on the *different* charge, and the fact of a *different* prosecution than authorized by the extradition, that for reasons strongly applicable to subsequent offenses the principle prohibits;—and not that the trial on the different charge of committing a subsequent offense, and the different prosecution on such charge while the extradition case is pending, is any the less a prosecution *different* from the one specified in and the basis of the extradition than would be such a prosecution for a prior offense. As said also by the Supreme Court of the United States in a case of international extradition:

> "The general scope of the two treaties makes manifest an intention to prevent a state from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then, having obtained possession of his person, to use it for another and different purpose." (*Johnson* v. *Browne*, 205 U. S., 309.)

This clearly is just as much applicable to a prosecution of the accused on a subsequent charge of committing a subsequent offense as it is to a prosecution on a subsequent charge of committing a prior offense. In either case the prosecuting state having obtained the custody of an individual whose extradition was sought and obtained on one ground and for one expressed purpose, is using the specially entrusted and specially limited possession of his person "for another and different purpose" than the one authorized by the *treaty*. This is not keeping faith with the treaty; it is a fraud upon the treaty, and a fraudulent violation of the rights of the accused. Had we been first given a trial to a final conclusion of the extradition charge, and acquitted; and then within the prescribed time return to the country of asylum, there cannot be the least doubt that if our extradition had thereafter been sought on the second perjury charge, it would have been refused upon the ground that the evidence adduced was entirely and absolutely insufficient to make out a *prima facie* case. Now the treaty says that the country of asylum shall alone be the judge of this. The treaty is not so ridiculous and preposterous as to confer any such power on the prosecuting state;—the very state opposed to the asylum reserved, and whose interest would necessarily be adverse to conserving or protecting it. We must look to the *principle* which controlled the decision in the Rauscher case, for it is that alone which gives value to the case as a precedent in law. Says Chief Justice Marshall in *Carroll* v. *Carroll*, 16 How., 287:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be

> taken in connection with the case in which those expressions are used."

(The *case* in *United States* v. *Rauscher* is not that it involved a charge of a "prior offense," but that it was a prosecution for an offense *different* from the one upon which the extradition was granted; and so is our case.)

> "If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court,"

(in the Rauscher case the question presented was precisely as in ours, whether pending the final termination of an extradition case, and while it was awaiting a trial to a final conclusion the accused, who had been extradited on a specific charge, could be arrested, placed on trial, prosecuted and convicted on another and different charge; and that is precisely our case also),

> "is investigated with care, and considered in its full extent; other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Surely no one will contend that the opinion of Mr. Justice Miller in the Rauscher case does not show an exceedingly learned and exhaustive investigation of the *principle* he laid down as being derived from and amply sustained by international law. It is the principle which fully and rightly responds to the broad question whether a prosecuting state having obtained the custody of an individual whose extradition was sought and obtained on one

ground and for one purpose, can lawfully use the entrusted possession of his person for another and different purpose than the one authorized by the *treaty*. We say that the very able opinion of Mr. Justice Miller fully and rightly responds to this broad question, dealing primarily, as in reason it must, with the feature presented of a *prosecution on a different charge*, while the extradition case was pending and awaiting trial to a final conclusion. This of course made quite immaterial the question whether the subsequent and different prosecution was for a prior or a subsequent offense, though in the actual application of the *principle* declared, to the special facts in the Rauscher case, reference was incidentally made to the adventitious and special circumstance there present of the prosecution being for a prior offense, with never a suggestion or intimation, however, that had it been for a subsequent offense it would have made any the least difference. The court made no attempt to revolutionize the *principle* of international law, by limiting it to the case of prior offenses. The court did, in what we have quoted, correctly state the principle, and as pointed out by Professor Moore, this statement of the principle is to be taken rather than that subjective portion of the court's opinion which speaks of a trial or prosecution on a charge of committing an offense previously to the extradition, which really is nothing more than the concrete application of the principle to the special facts of the case. (1 Moore on Extradition, Sec. 174.) The concluding portion of the court's opinion definitely settles this, and is quite as forcibly and obviously pertinent to a trial

and prosecution for an alleged *subsequent offense* as it is to a collateral prosecution for a prior offense; and the decisive and controlling point is that while the extradition case is pending and awaiting trial to a final conclusion *the jurisdiction over the person of the accused* is confined by the supreme law of the land to the specific charge on which he was extradited, and for that very conclusive reason it is impossible for any other jurisdiction on another and different charge to intervene or to interpose its claims. This reasoning of the Supreme Court of the United States is manifestly just as applicable to a subsequent prosecution on a charge of committing a subsequent offense as it is to a subsequent prosecution on a charge of committing a prior offense; in either case the requisite *jurisdiction* could not attach nor extend to the person of the accused while the extradition jurisdiction existed; and while the extradition case was pending and awaiting trial to a final conclusion. That this view is correct is made manifest by the following excerpt from the opinion of the court in the Rauscher case:

> "Under the views we have taken of the case the jurisdiction of the court to try such an offense" (one *different* from that on which he was extradited) "if the party himself was properly within its jurisdiction, is not denied; but the facts relied upon go to show that while the court did have jurisdiction to find the indictment, as well as of the questions involved in such indictment, *it did not have jurisdiction of the person at that time, so as to subject him to trial.*" (Italics ours.)

But why did the Supreme Court of the United States hold that there was no jurisdiction of the per-

son of the accused "at that time so as to subject him to trial"? Was it because the subsequent prosecution was for a "prior offense"? Manifestly and emphatically *no*. It was solely because the extradition case was pending, and awaiting trial to a final conclusion, and because the *extradition jurisdiction over the person of the accused*, was by virtue of the treaty and Section 5275 of the Revised Statutes of the United States *supreme and exclusive*, that the court held that no other jurisdiction could be acquired over the person of the accused on another and different charge; and this clearly is just as completely applicable to another and different charge based on the alleged commission of a *subsequent offense* as it is to one based upon the commission of a "prior offense."

As was well and expressively stated by the court in *People* v. *Stout*, 81 Hun, 341, a case of *habeas corpus* involving a matter of international extradition, in passing on the point:

> "By virtue of the supreme law of the land the custody of the relator was so qualified as not to exist other than for the purpose of his trial upon that specific charge" (the one stated in the extradition). "For any other purpose his person was beyond the legitimate control of the court, excluded from it by force of the international treaty before mentioned."

Now, mark you, this was not because the subsequent prosecution was for a "prior offense," but because the pendency of the extradition case, awaiting trial to a final conclusion, *excluded by reason of the supremacy of the pre-existing extradition jurisdiction*, all other jurisdiction over the person of the accused, and this necessarily whether on a subse-

quent or a prior offense. Surely no one will be ridiculous enough to contend that the prosecuting state can ignore the supremacy of the extradition jurisdiction, repudiate the obligations of the *treaty*, and seize and arrest the person of the accused, prosecute him to trial, conviction and sentence *on another and different charge*, and do this while the extradition case is pending and awaiting trial to a final conclusion.

Yet this is precisely what the State of California has done in our case, and its Supreme Court upheld the usurpation, very erroneously suggesting that the Rauscher case should be confined to the special and adventitious fact that there the subsequent prosecution was for a "prior offense," while here in our case the subsequent prosecution is for a subsequent offense: and further erroneously suggesting that in the Rauscher case there was "no occasion to define its precise extent," meaning the precise extent of the limitation as to prosecutions for other offenses. In other words, the state Supreme Court after it had expressly conceded that there were portions of the opinion in the Rauscher case favorable to the contention of the plaintiff in error, sought then to escape the authority of the case by resorting to the rather misleading or at least quite erroneous observation that there was no occasion in the Rauscher case for the court to define the "precise extent" of the law's limitation on the prosecution of the accused. There surely was occasion for the court to determine whether pending the extradition case and while it was awaiting trial to a final conclusion, and while Rauscher was

held by virtue of the supreme authority of the extradition jurisdiction, and on international process, to wit: the extradition warrant, he could be prosecuted to a conclusion, to trial and conviction on *another and different charge*, and whether the extradition jurisdiction, supreme and exclusive, operated as a matter of law to exclude the vesting of the requisite local jurisdiction over his person, essential to the subsequent trial and prosecution on the other charge.

There were both occasion and necessity for the Supreme Court of the United States to determine these questions in the Rauscher case, and the court in a very learned and exhaustive opinion, did determine them. Not only did the court determine these very questions, *but in carefully selected terms stated with much precision*, the scope and operation of the principle of the law controlling the decision; and did so in language in reason sufficiently and rightly broad and comprehensive to necessarily embrace every subsequent prosecution on any and every charge, whether of a prior or subsequent offense, while the extradition jurisdiction existed, and while the extradition case was pending and awaiting trial to a final conclusion. And pursuant to the principle controlling the decision, the court held that jurisdiction over the person of the accused, was confined to the extradition case and to the specific charge designated in the warrant of extradition; that in consequence there could be no jurisdiction acquired over him *on another and different charge*, but that on his final release from custody or imprisonment in the extradition case, he was entitled to a

reasonable time and opportunity to return to the country of asylum, "to depart in peace," free from all interference, interruption or detention. And this, as we have fully established in this brief, is the law upon both principle and authority. The Supreme Court of California entirely fails to grasp or even to inquire concerning the *principle of law* which controlled the decision in the Rauscher case, and holds as did some of the advocates of the old and now exploded doctrine that it is no concern of the country of asylum what becomes of the accused after he is extradited, nor whether he is prosecuted to a final conclusion upon the extradition charge, and to the exclusion of any other charge, nor whether his right to return to the country of asylum is or is not wrongfully or upon insufficient evidence taken away, impaired, or destroyed or unlawfully hindered and delayed; nor whether the sovereignty of the country of asylum is denied its prerogative to decide on the evidence adduced whether there is reasonable or probable cause to believe that the accused committed the alleged subsequent offense, extraditable in character, and should or should not be deprived of the protection of the "sovereign right of asylum" reserved to him by the *treaty*,—a question to be exclusively determined by the sovereignty of asylum, as the sole and only competent judge, and only possible of determination, as pointed out by Lord Derby, *on the return of the accused;* he is entitled not only to return on being finally released from custody or imprisonment in the extradition case, but also to a reasonable time and opportunity to do so; and his right cannot be

taken away, interrupted or obstructed by a subsequent prosecution on a subsequent charge, which may at best be nothing more than a false pretense or a mere pretext or subterfuge or entirely unfounded, and specially designed to destroy his right to return to the protection of the country of asylum. If, as in our case, he is convicted on the subsequent charge, without any evidence of guilt, and sentenced to a long term of imprisonment, his right to return, secured to him in the extradition case, will become absolutely worthless; it will be practically nullified. Surely no such destructive power as that is permitted by a *treaty* of extradition to the prosecuting state; on the contrary, such a power is repugnant to both the treaty and Section 5275 of the Revised Statutes of the United States. If the prosecuting state can take away or nullify the fundamental right of the accused to return to the country of asylum, it can take away and nullify the equally fundamental right to a trial to a final conclusion of the charge on which he was extradited; and it can abolish or nullify and obliterate absolutely the extradition jurisdiction; and if it can do these things, whether by means of a subsequent prosecution on a subsequent charge or by any other equally effective method, it can, because it does, practically nullify the *treaty*. This is what it signifies in the last analysis, and it is the logical extent of the annihilating power set up in our case by the State of California.

The Supreme Court of the state says in its opinion that the country of asylum "cannot be concerned in securing for him (the accused) immunity for new

crimes committed after his return to the demanding country." Nothing could be more specious and misleading. Of course, the country of asylum does not concern itself with the question of immunity; on the contrary, it is conceded that all such crimes if extraditable, as in our case, are open to prosecution; but to the end that such a prosecution will not interfere with the supreme and exclusive jurisdiction of the pre-existing extradition, over the person of the accused, on the specific charge upon which he was extradited, and, further, to the end that the subsequent prosecution will not be merely a false pretense or a mere pretext or subterfuge, or upon insufficient evidence, used to cut off, or impair or obstruct the reserved, supreme and "sovereign right of asylum" of the nation granting the pre-existing extradition, nor to cut off, impair or obstruct the equally supreme right of the accused to return to the country of asylum, on his acquittal of the charge on which he was extradited, no such subsequent prosecution on a charge of committing a subsequent offense can be maintained against him while the extradition case is pending and awaiting trial to a final conclusion, nor afterwards, except upon a *new* extradition where the alleged subsequent offense is extraditable in character, unless, of course, the accused voluntarily abandons the asylum reserved to him by failing to return to its protection within the prescribed time. *This is the law*, and it seems to have entirely escaped the attention of the Supreme Court of California

We would say to the Supreme Court of California, that the nation granting the extradition is most emphatically the nation most interested in maintaining

inviolate its own "sovereign right of asylum," the protection of which by the very act of extradition (limited as it is to a specific charge), it *reserves* to the accused, to be by him resumed on his final release from the charge on which he has been extradited;for this purpose and as an inseparable and essential condition of the extradition, it confers upon him the right to return to its protection.

Being the nation most vitally interested in maintaining its "right of asylum" and protecting the accused against the consequences of all violation of the right, it is its exclusive prerogative in right of its sovereignty to decide from the evidence adduced whether the asylum acquired by the accused and also *reserved* to him as an essential condition of the extradition, shall be again temporarily withdrawn, to authorize his prosecution on a charge of committing another extraditable offense, subsequently to the preceding extradition surrender. This protects against infringement interference or impairment by means of any arrest or detention on the subsequent charge of a subsequent offense, the fundamental right of the accused to return to the country of asylum, on his acquittal of the charge upon which he was extradited. And independently of all this, the country of asylum is interested in the due enforcement and the due execution of the *treaty,* and in that behalf, to the extent at least of the right to demand that the accused be given a trial to a final conclusion, of the specific charge on which his extradition was granted, and this to the exclusion of any and every other or different charge, and to insist that the prosecuting state, respect *the supremacy of the ex-*

tradition jurisdiction before proceeding to arrest and prosecute the accused on another charge; but whether the country of asylum has any interest in the matter or not, we would remind the Supreme Court of California that the *treaty* is the supreme law of the land and that the state and the United States are alike interested in complying with its requirements and conforming to its limitations. And we would repeat what the authorities cited in this brief fully establish, that a person extradited pursuant to a treaty, is entitled as of right to the asylum *reserved* for him and for his benefit by the nation granting the asylum; and consequently the Supreme Court of California is very much in error in asserting, as it does in our case, that forsooth a person *kidnapped* from the territory of a foreign country and brought into the United States cannot set up the lawlessness of his capture as against his prosecution on a criminal charge, that it follows in the case of a person *legally extradited pursuant to treaty* that there is no asylum reserved to him and to which he can be said to be entitled or to which he has the right to return; and from this very wrong and indefensible conclusion, the Supreme Court of California finds the transition very easy to the quite impossible deduction that the accused has no such thing as a right to return to the country of asylum.

Then, again, we note an entire failure on the part of the court to make or attempt any reply to the point that even were it competent to arrest and prosecute the accused on a subsequent charge of committing a subsequent offense, this certainly could not be done while the extradition case was pending

and awaiting trial to a final conclusion; and that the extradition jurisdiction over the person of the accused being derived from the *treaty*, the supreme law of the land, was therefore necessarily a jurisdiction supreme and exclusive, prohibiting while it existed any and every jurisdiction over his person on a subsequent charge of committing a subsequent offense. The court evidently supposed it successfully evaded the point by holding that "in the absence of any authority, compelling such conclusion, we are not prepared to hold that a person extradited under a treaty may, after his return, and pending his trial upon the extradition charge, commit any crime, however atrocious, with absolute security against prosecution until he shall have had an opportunity to return to the country from which he was taken."

While this is manifestly predicated upon a failure to understand the fundamental doctrine and principles of the law of international extradition, and is due to the evident want of acquaintance with the authorities on the subject generally, or the court would not have perceived anything startling or improper or impolitic in the doctrine, but would have seen that it was an essential condition of the extradition and necessary to the protection of the "sovereign right of asylum" *reserved* to the accused, against prosecutions without foundation, without evidence to sustain the charge, and prosecutions merely a pretext and subterfuge to cut off the protection of the "right of asylum" and of the right to return to the country of asylum, and prosecutions in fraud of the treaty, while, we say, all these matters so fully and exten-

sively already discussed in this brief, and the many authorities cited and quoted sustaining our position, would, if understood by the State Supreme Court, have revealed the necessity for the doctrine mentioned, to enable the nation granting the extradition and reserving to the accused the protection of its sovereign right of asylum, to maintain inviolate and against infringement or impairment this prerogative right in virtue of its sovereignty, by first passing on the evidence adduced and deciding therefrom whether a *prima facie* case existed on the subsequent charge of committing the subsequent offense, so as to require the further withdrawal or abridgement of the asylum reserved, if, we say, the State Supreme Court appreciated these fundamental principles and reasons of the law of international extradition, the court would not be seemingly taken by surprise in being confronted with a proposition it did not understand, and which it misrepresented by asserting that it gave immunity to crime.

But what we are at a loss to understand is why the court did not perceive that its decision went much further than to hold that the subsequent prosecution on the subsequent charge could be maintained without first affording the accused the "opportunity to return to the country from which he was taken," and went to the still greater extreme of holding that the subsequent arrest, trial and prosecution on the subsequent charge of committing a subsequent offense, could be maintained by the state, *while the extradition case was pending and awaiting trial to a final conclusion, and while the extradition jurisdiction, supreme and exclusive over the person of*

the accused, for the purpose of carrying out and executing the requirements of the treaty, still persisted and still continued in the full supremacy of its right and authority. The Supreme Court of the state never once adverted to this necessarily controlling phase of the case, unless, of course, it is the fact, not disclosed in express terms in the court's opinion, that having reached the conclusion that the right of asylum and the right of return to its protection, were both mythical, it would fall within the court's province to make the extradition jurisdiction and the extradition case, mythical also.

In any event, that is the practical effect of the decision. So, too, the Supreme Court of the state in citing and quoting Article 3 of the convention of 1889, could not and did not in the terms of that provision nor in the supposed negative provisions arising from the necessary omission of subsequent offense from its immunity clause, find the least permission for the arrest, trial and prosecution on charges of subsequent offenses, *while the extradition case was pending and awaiting trial to a final conclusion and while the extradition jurisdiction over the person of the accused, continued to be supreme and exclusive.* In this brief we have repeatedly pointed out that Article 3 of the convention of 1889 has no relevancy whatever to any of the questions presented in this case. Conceding that it does not extend its immunity to subsequent offenses, and, of course, it does not (it would be ridiculous if it did), the only deduction is that so far as this particular article is concerned, subsequent offenses can be prosecuted; but this does not mean that they can be

prosecuted while the extradition case is pending and awaiting trial to a final conclusion, and while the accused is held under the supreme and exclusive jurisdiction of the extradition for the purpose of executing the requirements of the *treaty*, the supreme law of the land; nor does it mean that subsequent offenses, extraditable in character, can be prosecuted without the necessity of a *new* extradition.

The article in question does not deal with these matters at all. It simply leaves them where in law they stood before Article 3 was adopted.

The State Supreme Court, in putting its perfectly untenable and absolutely indefensible and grossly illogical construction on Article 3, says:

> "By this provision the contracting governments reduced to an express and definite agreement the exemption which had been before implied. It seems clear that in limiting the exemption to crimes committed prior to extradition, the contracting parties indicated their intent that persons surrendered should not be exempt from prosecution for crimes subsequently committed. If under the former treaty there was any exemption for such subsequent crimes (which, as we have said, was not in our opinion the case), such exemption was removed by the new treaty."

Now the plain and the evident answer to all this is that no one ever supposed that "subsequent offenses" were within the immunity against prosecution, extended to prior offenses; and of course "subsequent offenses" are open to prosecution. Now that is as far as the State Supreme Court's construction of Article 3 can go; but it is manifestly a glaring *non sequitur* for the court to conclude from

this, that the prosecution of subsequent offenses can be maintained while the extradition case is pending and awaiting trial to a final conclusion and while the supreme and exclusive jurisdiction of the extradition continues over the person of the accused for the purpose of executing the requirements of the *treaty*,—the supreme law of the land. And it is equally a glaring *non sequitur* for the Supreme Court of the state to conclude that because you can prosecute subsequent offenses forsooth in that Article 3 does not grant immunity as to them, that you can maintain such a prosecution without a *new* extradition where they are of an extraditable character. The fact of the matter is that Article 3, besides being absolutely irrelevant to any of the questions presented, is but an expression of that which the law implies in any event, and hence is inoperative, the maxim being *expressio eorum quae tacite insunt nihil operatur*. Or, as Lord Coke says: "The expression of a clause which the law implies works nothing." (4 Rep., 73.) It is simply *clausula inutilis*. The person who deduces from Article 3 of the convention of 1889 any authority to prosecute subsequent offenses, or the authority to prosecute them while the extradition case is pending and awaiting trial to a final conclusion and while the supreme and while the exclusive jurisdiction of the extradition continues over the person of the accused, and thereby, according to such construction, makes the *treaty* stultify and nullify itself, or deduces authority to prosecute subsequent offenses extraditable in character, without the necessity of a new extradition, such a person reasons neither accurately, closely, carefully, nor logically, nor understands the law.

It follows that his conclusion or deductions must needs be wrong. In this brief we have already discussed the point that the record clearly shows that the extradition case has never been brought to trial to a final conclusion, and that on the contrary it has been *indefinitely* postponed over the objection and protest of the accused; also that the record shows the case could have been brought to trial within sixty days after the disagreement of the jury in December, 1905, and that since then repeated opportunity for its trial has existed, but against our objection a trial has been refused; now in face of these facts, the State Supreme Court says we did not offer

> "any evidence in support of the allegation that the trial on this charge has been unreasonably postponed agamst his objection and that the prosecution has no *bona fide* intention of putting him to trial on this indictment."

Yet in the very same opinion the court states them as facts in the case, when it says, as it does, that the extradition charge has not been brought to trial since the disagreement of the jury in the month of December, 1905, and that the district attorney proceeded to the trial of the second charge of perjury, against our objection. The record is clear and unequivocal, that at every step in the postponement of the trial of the extradition case, we most emphatically objected and protested against each and every continuance and against the substitution of the trial and prosecution of the second perjury charge; and further that we expressly based our objections and protest in each instance, upon the *treaty*, and upon Section 5275 of the Revised Statutes of the United States. Surely on the facts disclosed by the record

no one will have the temerity to contend that the extradition case has been brought to trial within the past three years to a final conclusion within a reasonable time or at all; nor that at any step in the various proceedings, we did not strenuously object and protest against each and every postponement of the trial of the extradition case, and against the arrest, trial, prosecution, conviction and sentence on the second perjury charge, and each time on the expressly stated ground that the same were and are in violation of the *treaty* and of Section 5275 of the Revised Statutes of the United States. And concluding our comment in review of the opinion and decision of the State Supreme Court, we desire to say the same are palpably at variance in all essentials with the well settled principles and doctrines of the law of international extradition, and with the many authorities referred to in the preceding pages of this brief,—a very self-evident proposition. The views announced by the court as the basis of its decision are an absolute abolition of the supreme and exclusive jurisdiction of the extradition over the person of the accused, and are therefore a nullification of both the *treaty* and Section 5275 of the Revised Statutes of the United States; and they are also an abolition of the "sovereign right of asylum," of the supreme right of the accused to return to the country of asylum on his acquittal or other final release on the extradition charge, and therein of his right to obtain such acquittal and release on that charge, of his supreme right to a trial to a final conclusion, and within a reasonable time of the charge on which he was extradited, and to the exclusion of

every different charge, of the law that the asylum he acquired is only abridged and modified and then temporarily to the special extent of the particular extradition and no further, and that as to every different charge or accusation other than the one upon which he has been extradited, the asylum is *reserved* to him, and he is deemed to be actually in the territory and upon the soil of the nation granting the extradition, and finally is an abolition of the supreme prerogative of that nation, held by it in right of its sovereignty and secured to it by the *treaty*, to determine from the evidence adduced, whether the asylum reserved to the accused shall be again temporarily withdrawn or abridged to the extent of the subsequent charge of committing a subsequent offense, extraditable in character, and this to the end that the "sovereign right of asylum" shall not be invaded or violated nor destroyed in the protection it guarantees the accused in every case of extradition, simply by a resort to a subsequent prosecution as a pretext or subterfuge, or without sufficient evidence, in deprivation of the right of the accused to return to the country of asylum and to the protection of its laws. This is an absolutely necessary power in the country of asylum to protect its "sovereign right of asylum," and to prevent fraud and evasion against the *treaty* pursuant to which the extradition was granted; and to that extent only was the acquired asylum withdrawn, being *reserved* to the accused in all other respects against any and every charge or prosecution not within the authority conferred by the particular extradition, and especially against his arrest, trial and prosecution on a subse-

quent charge of committing a subsequent offense of an extraditable character, thus necessitating a *new* extradition. On all these matters we have cited and quoted in this brief, many authorities fully sustaining the points we have made.

If, as held by all the authorities, it is the legal and necessary result of every extradition that there is *reserved* to the accused, the protection of the "sovereign right of asylum" of the nation granting his extradition, it must needs be that this nation shall alone possess competent power and authority to decide, and upon evidence adduced by the prosecuting state, whether this *reserved* asylum shall be modified or abridged upon the subsequent charge of the commission of a subsequent but extraditable offense; and this, of course, is only possible on a *new* extradition. The Supreme Court of California cites no authority to sustain its decision, nor is it possible to find any such authority, for it does not exist; and needless to say, could not exist without first abolishing the law itself, and repudiating the *treaty*. What we have said in review of the decision of the State Supreme Court will equally apply to the opinion of Judge Van Fleet, who simply gives his approval by way of *dicta* to what is stated in the opinion of the state court. We pass on to the presentation of additional authorities in decided cases, and which fully sustain the points we make.

X.

ADDITIONAL AUTHORITIES.

As distinguishing a case of extradition from one where the accused was unlawfully and violently smuggled into this country and then put on trial, the Supreme Court of the United States held that in the one case there was the protection of the "sovereign right of asylum," and in the other there was not; and speaking of the decision in the Rauscher case, said it was there held that

> "when a party is duly surrendered, by proper proceedings, under the treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed, both in regard to himself and in good faith to the country which had sent him here, was that he should be tried for no other offense than the one for which he was delivered under the extradition proceedings." *Ker* v. *Illinois*, 119 U. S., 442.

In a subsequent case, the court was confronted with a new attempt to evade the *treaty* and prosecute the accused on a charge upon which he had not been extradited, and this, while the extradition case was pending and awaiting trial to a final conclusion, —just as in our case.

The court, by the chief justice, say:

> "The treaty and statute secured to Cosgrove a reasonable time to return to the country from which he was surrendered, after his discharge from custody or imprisonment for or on account of the offense for which he had been extradited,

> and at the time of this arrest he had not been so discharged by reason of acquittal; or conviction and compliance with sentence; or the termination of the state prosecution in any way. *United States* v. *Rauscher*, 119 U. S., 407, 433."

Manifestly the principle here declared is precisely the one for which we are contending.

Further on, in its opinion, the court say:

> "The offenses, indeed, were different, and different penalties were attached to them. But it is immaterial that Cosgrove might have been liable to be prosecuted for both, as that is not the question here, which is whether he had had an opportunity to return to the country from which he had been taken. * * * We are of the opinion that under the circumstances Cosgrove retained the right to have the offense for which he was extradited disposed of and then to depart in peace, and that this arrest was in abuse of the high process under which he was originally brought into the United States, and cannot be sustained. (*Cosgrove* v. *Winney*, 174 U. S., 64, 68, 69.)"

If Cosgrove had or "retained the right to have the offense for which he was extradited disposed of and then to depart in peace," why not every person who is extradited pursuant to treaty? The right to a trial to a final conclusion and within a reasonable time, and to the exclusion of every different charge, is a right conferred by the *treaty* and by Section 5275 of the Revised Statutes, and they being the supreme law of the land, this right they establish is necessarily supreme and exclusive, and necessarily excludes every prosecution and trial on a charge of subsequently committing a subsequent offense, at least before the right to return expires.

In a case decided by the United States District Court for the District of California, and in an exceedingly able opinion by Judge Hoffman, a jurist of splendid attainments, the question is very elaborately discussed and the authorities cited. The views of Lord Derby in the Winslow case are set forth and shown beyond all doubt to be the law; so also is the proposition that if pending the trial and determination of the extradition case, "proofs are discovered of another crime, a new demand in extraditing must be made."

Judge HOFFMAN in the course of his opinion says with persuasive force:

> "The legislation of both Great Britain and the United States appears to have given a practical construction to the treaty in accordance with the views I am attempting to maintain. The British act of parliament of 1843, which was passed to carry into effect the treaty of the preceding year, provides (Sec. 3) that upon the certificate of a justice of the 'peace,' etc., 'it shall be lawful for one of her majesty's principal secretaries of state * * * by warrant under his hand and seal to order the person so committed, to be delivered to such person or persons as shall be authorized, in the name of the United States, to receive the person so committed and to convey such person to the territories of the United States *to be tried for the crime of which such person shall be so accused.*' The words, 'and for that crime alone,' or 'for none other' are not, it is true, found in the act, but the motive and object of the surrender are so explicitly stated that the statute on every principle of fair and rational interpretation should be construed as if those or equivalent words had been inserted. The language of our own act of congress of 1848 is identical with that of the British act. It directs the person

> so committed to be delivered, etc., *'to be tried for the crime of which such person shall be so accused.'* The same language is used in the warrant under which the fugitive is surrendered. But if by a fair construction of the treaty the extradited person, after being tried for the offense of which he has been 'so accused,' may be tried for any other offense, neither the law nor the warrant express the whole object of the surrender. Will it be contended that any secretary of state would venture under the act to issue a warrant directing the surrender of the fugitive to be tried for the offense of which he has been accused, and after such trial, to be tried for any other offense which may be charged against him? To put this question is to answer it." (*United States* v. *Watts*, 8 Sawyer, 370.)

This certainly is a very conclusive view of the case, and it sustains to the full extent the position upon which we rely and is a very decisive argument against the proposition put forth by the State Supreme Court in its opinion.

Judge HOFFMAN further says:

> "The treaty is 'the supreme law of the land,' and as binding on the courts as a statutory enactment. If it contained an express prohibition the court would, beyond doubt, be deprived of jurisdiction. If by a just and reasonable interpretation the prohibition must be implied, the same result follows."

In a case before Judge DEADY in the United States District Court in Oregon, he said:

> "The treaty of 1842 is not only a contract between the governments of Great Britain and the United States, but by virtue of the Constitution of the latter (Article 6) it is also the supreme law of the land. It contains an explicit

> enumeration of the offenses for which persons may be extradited under it, and, by a necessary implication, the person surrendered under it is only allowed and held within the jurisdiction of the receiving government for the purpose of trial on the charge specified in the warrant of extradition. For the latter government to detain such person for trial on any other charge would be not only an infraction of the contract between the parties to the treaty, but also a violation of the supreme law of this land in a matter directly involving his personal rights." (*Ex parte Hibbs*, 26 Fed. Rep., 431.)

This very correctly indicates and defines the legal *status* of an extradited person when brought into the United States; and, of course, it must be the conclusion that the *status* cannot be impaired or modified or destroyed by any subsequent act on the part of the receiving state, whether it be in the nature of a trial or prosecution for an alleged subsequent offense or by any other method that the state may see fit to devise and pursue. In a case where there was no subsequent arrest for a "prior offense," but an arrest on a matter *post facto*, the extradition, and as a provisional remedy in a subsequent civil suit, Judge BROWN said:

> "The principle is that the proceeding under the treaty is for a limited and defined purpose only, *and that the exercise of jurisdiction over the prisoner for any other purpose than that mentioned in the treaty, until he has an opportunity to return, is a fraud upon the rights of the party extradited, and bad faith to the country which permitted the extradition.* (Italics ours.) * * * If the extradition proceeding and the presence and custody of the prisoner here are for the single named purpose only; and if the exercise of any other jurisdiction over

him, before he has a reasonable time to return, is a perversion of the treaty and the law, and a fraud upon the rights of the accused,—it is manifestly immaterial at what stage of the extradition proceedings, or in what place in the course of those proceedings, such a perversion or interference with the rights of the prisoner takes place." (*Ex parte Baruch*, 41 Fed. Rep., 472.)

In another case of similar character, and where the subsequent arrest was not for a "prior offense," but on and by authority of a provisional remedy in a civil suit entirely *post facto*, the extradition, the Supreme Court of New York, composed of judges of great and distinguished ability, held the subsequent arrest to be in violation of the treaty with France, and in the course of a learned and exhaustive opinion said:

"It may be properly assumed, in the disposition of it (the objection), that he was a fugitive from justice, residing in the French Republic, and only amenable to the laws of this state, by force of the extradition remedy provided for by the treaty. Without the provision made, he could not have been brought here from that country. And that provided it could be done only in a prescribed and particularly enumerated class of cases. The effect of such a specification, according to well settled principles of construction, is, to exclude the remedy from all but the enumerated cases. As to those not mentioned, the negative is as effectually implied, as though it had been expressly declared. For that reason, when the defendant was extradited, it was for the purpose of answering the crime mentioned in the proceedings taken against him, and for no other purpose whatsoever. *As to all other matters being beyond the reach of the laws of this state, he was absolutely*

entitled to his freedom. He was extradited for a single special purpose, that of being tried for the crime, for the commission of which he was removed from the protection of the laws of France. *Beyond that, he was entitled to the protection of those laws, so far as his personal liberty would have been secured by them, in case no removal of his person had been made.* (Subject, of course, to a new extradition.) In the language of the treaty, he was delivered 'up to justice' because he was accused of one of the crimes which it enumerated. And it was implied in his surrender, that he should be at liberty to return again to France, when the purposes of justice had been performed in the charge made against him. The nature of the treaty, as well as good faith with the foreign power entering into it, will permit of no other construction. That power consented, by the provisions made, to surrender the person, entitled in all other respects to its protection, for trial and punishment, on a particularly specified charge; and for no other end or object whatsoever. Without the provision made, he could not be extradited at all, and by that, it can only be done for a clearly defined object. And it therefore becomes the duty of the power, to which the surrender may be made, faithfully to secure its proper observance. For some purposes that has been expressly provided by the act of congress, requiring the president to take all necessary measures for the protection of the extradited person against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant, and until his final discharge from custody or imprisonment, for or on account of such crimes or offenses, and for a reasonable time thereafter.

"It is true that this provision does not, in terms, include the present case, for it only extends to acts of lawless violence, (it was subsequently held in the Rauscher case that the stat-

ute goes much farther and prohibits a trial on any charge other than the one specified in the extradition proceedings); but it is cogent evidence of the spirit of the obligation, resting upon the public authorities, to restrict the restraint imposed simply to the crime charged and mentioned in the treaty. *The obligation is no greater to protect the party from lawless violence, than it is to protect him from all other detentions of his person.*

"After the purposes of justice are satisfied as to the particular offense for which the party may be surrendered, then his right to return again to the protection of the laws he was deprived of for the single object allowed by the treaty, *is clear and absolute.* (Italics ours.) * * * If the power of detention and restraint is extended beyond them (the extradition charges), then there is no obvious limit to which it cannot be carried; and a person brought into the country, under the treaty for one purpose, *may be detained here indefinitely for an entirely different purpose.* (Italics ours.) No people are more interested in denying such a latitude of oppression than our own; for, otherwise, our citizens could be forcibly taken abroad upon one charge, and detained there, *on the abandonment of that upon others for which their extradition would never be consented to or allowed.* (Italics ours.) The principle in the case is an important one, and it necessarily grows out of the treaty stipulations made with other countries. They are part of the supreme law of the state, superior to those of its own enactment, by an express provision of the Constitution of the United States. And it is the duty of the courts to maintain its observance. * * * Certainly, no other principle than that securing immunity from arrest for causes not provided for by the treaty can either fairly or reasonably be deduced from its purposes and provisions." (*Bachrach* v. *Lagrave,* 1 Hun., 689, 692 to 695.)

This clearly is a very strong argument firmly founded on both principle and authority, and to a mind of logical trend, is surely very convincing. The Court of Appeals of New York, while commending the opinion in the case, yet reversed the judgment for reasons which have long since been overruled. Speaking of the opinion and judgment of the Supreme Court of New York in the case above quoted at much length, Judge HOFFMAN says in *United States* v. *Watts*, 8 Sawyer, 370:

> "This judgment was reversed by the Court of Appeals in 59 N. Y., 110—but not upon any claim that on the principles of international law or by the terms of the treaty, a prosecution for an offense other than the offense for which surrender has been made was permissible. On the contrary, the immunity claimed is pronounced eminently just in principle. The decision turned upon the supposed inability of the court to interfere."

There are two cases already referred to in an earlier part of this brief—one in Ohio and the other in Kentucky, both of which were the subject of diplomatic correspondence with Great Britain prior to the judicial disposition of them, the latter alone resulting in the discharge of the prisoners.

In the diplomatic correspondence the United States fell back upon its position as urged in the Winslow case, and the result was that the prisoners continued in custody until the courts taking the contrary and correct view of the law liberated them. In the case in Ohio, the court in a very able opinion, speaking through the chief justice, say:

> "The treaty secures to the person extradited exemption from trial for crimes and offenses

other than those specified in the warrant of extradition," citing with approval, *Com.* v. *Hawes*, 13 Bush, 700; *United States* v. *Watts*, 8 Sawyer, 370."

The court then refers to the right given by the *treaty* to the country of asylum to first pass upon the case, and says:

"This necessarily excludes the idea that the demanding government can decide for itself to try the prisoner, after obtaining custody, for other crimes; otherwise the purpose of the treaty is defeated. If the demanding government can so decide, the whole intention of the treaty could be defeated, *and the right of asylum, which has been the boast of both governments, would depend entirely on the action of the demanding government.* (Italics ours.) To extradite under the treaty for an offense named therein, and then to retain the prisoner for a non-extraditable offense, or for a different one, though extraditable, upon which no hearing had been had as provided in the treaty, would be, not only a breach of good faith by the demanding government, *but a violation of the right of asylum in favor of the accused guaranteed to him by the treaty. The sole object of the treaty was to enable each government to protect its citizens and inhabitants in the right of asylum, except they come within the provisions named.* (Italics ours.)

"The legislation of both governments clearly supports this construction. By the act of congress of 1841, United States Rev. Stats., Section 5272: 'It shall be lawful for the secretary of state, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized in the name and behalf of such foreign government, *to be tried for the crime of which such person shall be so accused.*'

"Again, by Section 5275: 'Whenever any person is delivered by a foreign government and brought into the United States and tried for any crime of which he is duly accused,' it is the duty of the president to take proper measures for his 'transportation and safe-keeping until the conclusion of his trial, for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment, *for or on account of such crimes or offenses, and for a reasonable time thereafter,* and may employ such portions of the land or naval force of the United States or of the militia thereof as may be necessary for the safe-keeping and protection of the accused.'

"In like manner, the British Parliament, in 1843, for the purpose of carrying into effect this treaty, enacted that the person to be extradited should be delivered to the person authorized by the United States to receive him 'to be tried for the crime of which such person shall be accused.' While legislative interpretations of statutes is not conclusive upon the courts, yet in the case of a treaty which is in its nature a contract between nations, enactments like these by the high contracting parties, are of persuasive power in the construction of the treaty. The right of the State of Ohio over the accused, who had sought an asylum in Canada, is derived from the provisions, express or implied, of the treaty of 1842. *In view of this treaty, the safeguards therein provided against the infringement of the right of asylum save in the specified cases* (italics ours), and the legislation by both governments to carry out those provisions, we think it clear that the court below did not err in refusing to put the accused on trial for a crime for which they were not extradited." (*State* v. *Vanderpool,* 39 Ohio St., 278, *et seq.*)

Yet, with this very decision before it, and other authorities of like import, the Supreme Court

of California files an opinion in our case, that there is no such thing as a right of asylum and no such thing as a right vested in or conferred upon the accused to return to the country of asylum on his final release in the extradition cases.

Take Judge Hoffman's very pertinent and very forcible suggestion in the *Watts case*, that the British Act of 1843 to enforce the *treaty* (and in Great Britain a treaty is of no effect until put into operation by an Act of Parliament), is rightly to be construed as if in terms express and positive, it said that the accused is to be delivered to the United States to be tried for the crime of which he shall be so accused, *and for no other*" (and this British Act of 1843 is part of the charter of our liberties, for pursuant to it we were extradited), is there any person so mentally obtuse, or perverted in intellect, as not to be able to perceive that this prohibits a trial of the accused on a subsequent charge of committing a subsequent offense, and requires as of first and highest obligation resting on the prosecuting state, that the accused be given a trial to a final conclusion and within a reasonable time, and to the exclusion of any and every different charge, of the specific charge on which his extradition was granted?

And is it not perfectly plain to any lawyer that such, too, is the meaning of Section 5275 of the Revised Statutes of the United States, almost in mandatory words, imparting the very idea? And how can there be any doubt about it when in the *Rauscher case*, and more recently in *Johnson* v. *Browne*, the Supreme Court of the United States has placed precisely that very construction on this stat-

ute and never for an instant entertained the very absurd notion that it was subject to any exception in favor of nullifying the treaty and nullifying the extradition on a specific charge, by shelving the extradition case and using the custody of the accused, and taking advantage of the possession of his person, especially entrusted on the faith of the extradition, to arrest, try, prosecute, convict and sentence him to fourteen years' imprisonment *on an entirely different charge.*

The effect of the British Act of 1843 in requiring a trial on the specific charge on which the extradition was granted, and prohibiting a trial on any other and different charge, prior or subsequent, will be found very clearly discussed in the exceedingly able argument of Lord Chancellor Cairns before the House of Lords in the Winslow case (Foreign Rel. U. S., 1876, pages 290, 291).

Again, we find the British Act of 1843 referred to in the same connection, by the highest court of Kentucky in a very well considered case,—the *Hawes case*, already frequently mentioned in this brief. The court, speaking of the British Act of 1843, say:

> "The precise purpose for which the fugitive is to be surrendered is set out in exact and apt language, and the act negatives by necessary implication the right here claimed, that the person surrendered may be tried for an offense *different* from that for which he was extradited. It is provided by the third section of the Act of Congress of 1848 that 'it shall be lawful for the secretary of state, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized in the name and on behalf of such for-

> eign government, to be tried for the crime of which such person shall be accused.' This, like the Act of Parliament, declares the purpose of the surrender to be, that the alleged offender may '*be tried for the crime of which such person shall be accused.*' The Act of Congress is, in one view, more important than the British Act of 1843. It does not rest alone on the proper interpretation of a particular treaty, and may be regarded as a legislative declaration of the American idea of the fundamental or underlying principle of the international practice of extradition."

Manifestly it would be sheer nonsense to say that the purpose of this principle thus forcibly stated by the court is merely to protect the accused against prosecution for a "prior offense," and that it is inoperative and meaningless against a prosecution on a charge of committing a subsequent offense, that the latter prosecution operates to destroy the principle and to destroy the right of the accused to a trial to a final conclusion of the charge on which his extradition was granted. We say "destroy" the right, because if the right exists, it is necessarily supreme, paramount and exclusive over all the laws, the process, the power, the authority, and the judicial proceedings and jurisdiction of the State of California; it is supreme and exclusive because the Constitution of the United States says that the law which has created and established the right, is the supreme law of the land. It follows and the only admissible conclusion is that there can be no jurisdiction acquired by the State of California over the person of the accused on a charge or a prosecution predicated upon the alleged commission of a subsequent offense, until *after* the final disposition of the

extradition case, and after the accused has been given a reasonable time and opportunity to return to the country of asylum.

In the *Hawes case,* the court further say:

> "The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from and is measured and restricted by the provisions, express and implied, of the treaty. The fugitive, Hawes, by becoming an inhabitant of the Dominion of Canada, secured the protection of British laws, and we could only demand his surrender in virtue of our treaty with that government, *and we held him in custody for the purposes contemplated by that treaty, and for none other.*" (Italics ours.)

The court cites and approves the statement of Lawrence in 14 Albany Law Journal, page 96, that

> "the state receiving the fugitive has no jurisdiction whatever over him except for the specified crime to which the testimony (in the extradition case) applies."

The court approves the excerpt from *Heffter,* and speaks of it as "this dominant principle of modern extradition," and says it is recognized by the British Act of 1843, and the Act of Congress of 1848 to the effect that the accused is surrendered *"to be tried for the crime of which such person shall be so accused."*

And then the court very expressively say:

> "Hawes placed himself under the guardianship of the British laws by becoming an inhabitant of Canada. We took him from the protection of those laws under a special agreement,

and for certain named and designated purposes. To continue him in custody after the accomplishment of those purposes, and with the object of *extending the criminal jurisdiction of our courts beyond the terms of the special agreement would be a plain violation of the faith of the transaction, and a manifest disregard of the conditions of the extradition.* (Italics ours.)

"He is not entitled to personal immunity in consequence of his flight. We may yet try him under each and all of the indictments for embezzlement, and for uttering forged paper, if he comes voluntarily within the jurisdiction of our laws, or if we can reach him through the extradition clause of the federal constitution or through the country of a foreign government. But we could not add to or enlarge the conditions and lawful consequences of his extradition, nor extend our special and limited right to hold him in custody to answer to the three charges of forgery, for the purpose of trying him for offenses other than those for which he was extradited. We conclude that the court below correctly refused to try Hawes for any of the offenses for which he stood indicted, except the three charges of forgery mentioned in the warrant of extradition, and that it properly discharged him from custody." (*Com.* v. *Hawes*, 13 Bush., 707.)

When the Hawes case came before Judge JACKSON, who presided in the trial court, he said:

"With me when there is a solemn duty staring me in the face, which would preclude a trial, although the party might be in the custody of the court, I would not disgrace my government or my country by the assumption of jurisdiction, when by such assumption the plighted faith of my government would be violated. *The prisoner cannot be tried for any offense for which he was not extradited;* and although he may be within the bar of the court or in a jail under the

> control of this court, as *this court is bound to regard the treaty, it is outside of its jurisdiction to proceed with the trial as 'the supreme law of the land' otherwise provides.*" (*Albany Law Journal*, Vol. 16, page 362.)

And Mr. Lawrence strongly endorses these views of Judge Jackson; they are rightly honored and respected in every court except the state courts of California.

In a case before the Texas court of Appeal, it is very clearly and impressively stated:

> "In exact and unequivocal language the treaty sets out the precise purpose for which the fugitive is to be surrendered, and negatives by implication as strong and conclusive as a direct and positive negation that the person surrendered may be tried for an offense *different from that for which he was extradited under the stipulations of the contract made between the high contracting parties.*" (*Blandford* v. *State*, 10 Tex. App., 638.)

Follow this suggestion, and suppose the *treaty* contained an express, or, as the court puts it, "a direct and positive negation," that the accused shall not be tried or prosecuted upon any charge other and different than that on which he has been extradited, until after his final release on the extradition charge and until he is thereafter first given a reasonable time and opportunity to return to the country of asylum, would any one be so ridiculous as to contend that in the face of this prohibition he could be put to trial and prosecuted on a subsequent charge of committing a subsequent offense and while the extradition case was pending and awaiting trial to a final conclusion? Not even the state courts of

California would be willing to ostensibly venture that far, and to that extreme in repudiating the treaty.

Yet the prohibition supposed is in the *treaty* as fully as if expressed in language of the most peremptory character.

And, as said by Judge HOFFMAN in the *Watts case*,

> "the treaty is 'the supreme law of the land,' and as binding on the courts as a statutory enactment. If it contained an express prohibition, the court would, beyond doubt, be deprived of jurisdiction. If by a just and reasonable interpretation the prohibition must be implied, the same result follows."

And he decided on a most thorough and exhaustive review of the authorities that the prohibition we have above instanced is the very prohibition contained in the treaty, by necessary implication of law, and as fully and effectively as if therein written in words positive and peremptory.

The Court of Appeals of Texas also said:

> "Our conclusion is, that the party extradited, must be tried, *if tried at all, alone upon the charge upon which he was extradited*, unless the judicial tribunals of this state have no right to take cognizance of, and give effect to treaty stipulations between our own and foreign governments." (The italics are ours.) *Blanchford* v. *State*, 10 Tex. App., 639.)

Again we direct attention to the point that it is the *principle of the law* to which we must look and not the special application of it to any particular case which may involve a special phase in addition to the general and ruling facts which render the *principle* applicable. All the authorities agree that a

different prosecution on a *different* charge than that specified in the particular extradition is the thing prohibited. The reasons, the policy and the very purpose of the *principle of law* on which this prohibition rests, make it as strongly applicable to a different prosecution on a different charge of committing a *subsequent* offense, as it is to a different prosecution on a different charge of committing a "prior offense." They are both of them *different* from the charge and prosecution specified in the particular extradition, and it is this alone that is prohibited, and it is this alone that calls for the prohibition. We have cited and relied upon the cases where the *principle* was applied to prosecutions on charges of "prior offenses," solely because they were *different* from the prosecution and the charge specified in the particular extradition, and not because of the fact of their being for "prior offenses," which intrinsically considered, could make no difference whatever. The reasoning adopted by the authorities, proves this to the certainty and conclusiveness of a demonstration. The distinction suggested and drawn by the Supreme Court of California, between offenses committed prior and those committed subsequently to the extradition surrender, in the application of the prohibition we invoke, is entirely *arbitrary*, and in all likelihood lies in the fallacy of taking the immunity applicable alone to "prior offenses" *against all prosecution*, an immunity recognized by Article 3 of the convention of 1889, and at that point, thence drifting into the manifest *non-sequitur* that forsooth there is no such immunity extended to subsequent

offenses (it would be absolutely ridiculous if there was any such immunity given subsequent offenses; it would be nothing short of insanity) that therefore the subsequent offense cannot only be prosecuted, but prosecuted without a *new* extradition, if it be extraditable in character, *and further still,* that it can be prosecuted, and the accused arrested, put on trial, convicted and sentenced, while the extradition case is pending and awaiting trial to a final conclusion, and consequently *while the extradition jurisdiction over his person, persists and continues in the amplitude and plenitude of its supreme and exclusive right and authority, by virtue of the treaty, the supreme law of the land.* It must be clear and conclusive that the opinion and decision of the Supreme Court of California proceed fundamentally on an entire misconception of the nature and scope of a very elementary *principle* of the law of international extradition, and are absolutely indefensible, because palpably and absolutely erroneous in every essential particular.

We are now prepared in the regular order indicated, to take up the history and meaning of Section 5275 of the Revised Statutes of the United States, which statute is alone sufficient to sustain our case, and entitle the appellant and plaintiff in error to his release from the imprisonment of which he complains, and to his restoration to his liberty upon *habeas corpus.*

The Supreme Court of California sweeps aside this statute with the remark, to us not at all intelligible, that

> "there is, in our opinion, nothing in the provisions of Section 5275 of the Revised Statutes

of the United States which conflicts with the views herein expressed."

This is all that the court says upon or about the statute, and it could just as well have said the same thing about the statute *de donis conditionalibus*, for all the meaning the remark conveys or imparts to the mind familiar with the law.

XI.

THE LAW OF SECTION 5275 OF THE REVISED STATUTES OF THE UNITED STATES.

If there is any meaning at all in Section 5275 of the Revised Statutes of the United States, it is not only in conflict with the views expressed by the Supreme Court of California, in our case, but it fully sustains our contention that the imprisonment of which we complain is unlawful. While the State Supreme Court takes occasion to give us an analysis, and a very imperfect as well as erroneous analysis of the opinion of the Supreme Court of the United States in the Rauscher case, there is nothing whatever said about the construction placed by the court and by Mr. Justice Gray in his concurring opinion upon the statute in question.

In the view of the State Supreme Court, the statute is as mythical as the extradition jurisdiction, and equally as mythical as it held to be the right of the accused to a trial to a final conclusion, and within a reasonable time, and to the exclusion of every different charge, of the specific charge on which his extradition was granted, and as mythical

as it held his right to return to the country of asylum on his final release in the extradition case.

To insure the due observance of and proper compliance with the requirements and obligations prescribed by *treaties of extradition*, in favor of the accused, Congress enacted, on March 3, 1869, the statute entitled:

> "An act further to provide for giving effect to treaty stipulations between this and foreign governments for the extradition of criminals." (15 Stat. at Large, 337.)

This statute was brought forward and is now Section 5275 of the Revised Statutes of the United States. The statute seems to have first come into discussion at the time of the Winslow controversy, when the government of the United States, through Mr. Fish, then secretary of state, said that the statute "does not affect or limit the rights of the two governments on the question."

2 Wharton's Dig. Int. Law, page 762.

The Attorney General took the same view (p. 797). Then the question came before Judge BENEDICT, and he said in disposing of it:

> "The Act of Congress of 1869is a general law, intended for the protection of extradited offenders; but the protection it confers is expressly limited, to cases of 'lawless violence.' It is true it assumes as well it may, that the offender will be tried for the offense upon which his surrender is asked, but there are no words indicating that he is to be protected from trial for all other offenses. The absence of any provision indicating an intention to protect from prosecution for other offenses, in a statute having no other object than the protection of extradited offenders,

> is sufficient to deprive of all force the suggestion that the act of 1869, as a legislative act, gives to the treaty of 1842 the construction contended for by the accused." (*United States* v. *Lawrence*, 13 Blatchf., 301.)

The question came before the New York Court of Appeals and it was there held by the court in the course of the opinion rendered as follows:

> "Congress doubtless has power to pass an act similar to the English act referred to, as the whole subject of extradition is confided to the federal government. It has exercised this power by passing an act to protect fugitive criminals from lawless violence. (15 U. S. Stat. at Large, 337, § 1.) *That these provisions ought to be extended to protection from other prosecutions or detention, I do not doubt, but until this is done by the law-making power, by treaty or statute, we feel constrained to hold that the courts cannot interfere.*"

These were the views expressed by Church, C. J., on behalf of the court. The italics are ours.

Adriance v. *Lagrave*, 59 N. Y., 116.

In one of his very able articles in the Albany Law Journal, Mr. LAWRENCE strongly combats this view, and he says:

> "The act of 1869, for the protection of a person extradited under a treaty (Revised Statutes, § 5275), I consider, despite the opinion of the Court of Appeals in *Adriance* v. *Lagrave*, (59 N. Y.), sufficient to meet the case of a trial for an offense for which the prisoner was not surrendered." (Albany Law Journal, page 364.)

The Supreme Court of Ohio adopted the same view of the statute, in the Vanderpool case. Then

came the decision of the Supreme Court of the United States in the *Rauscher case,* 119 U. S., 407, and that decision set the question at rest, in terms that do not leave room for doubt nor controversy. Since then, the court has confirmed the construction it then placed on the statute, (*Cosgrove* v. *Winney,* 174 U. S., 64; *Johnson* v. *Browne,* 205 U. S., 309), and it is now well settled that the statute secures to the extradited prisoner, a trial to a final conclusion, *to the exclusion of every different charge,* of the specific charge on which his extradition was granted, and also secures to him the right to return to the country of asylum, upon his final release on the extradition charge or within a reasonable time thereafter. No exception can be read into the statute in favor of prosecutions or charges on alleged subsequent offenses. The statute makes no such exception, and the courts are powerless to interpolate an exception. It is not the province of the judiciary to enact laws, nor to abrogate confessedly valid legislation. For the reasons already given and discussed *in extenso* in this brief, the exception mentioned would be destructive of the most important and fundamental principles of the law of international extradition, and operate in practice to nullify the *treaty,* and all the essential requirements of the treaty, and open wide the door to fraud and evasion against the rights and obligations it prescribes. Instead of Section 5275 of the Revised Statutes, accomplishing its sole and only purpose of protecting the accused in the rights conferred upon him by the *treaty,* it would by means of the proposed exception, destroy those rights and kill the treaty. Not

only does the statute protect the accused against "lawless violence," but it protects him against any and every custody, detention or imprisonment of his person upon any and every different charge than the one specified in the extradition proceedings; and its phraseology is only intelligible upon the interpretation that he is entitled to a trial *to a final conclusion* of the charge on which he was extradited, to the end that he may as speedily as reasonable diligence in his prosecution, will permit, avail himself of his right to return to the protection of "the sovereign right of asylum," reserved to him by the nation granting his extradition. The statute, in other words, is an enactment of the proposition quite forcibly and very accurately expressed by Judge Cooley and repeatedly quoted in this brief, that the accused is in the state by compulsion upon a single accusation; "he is entitled to have this disposed of, and then to depart in peace." That surely does not mean that he can be arrested and detained on a subsequent charge of committing a subsequent offense,—a matter very fully discussed in the preceding pages of this brief, and our contention shown to be amply sustained on both principle and authority. We will now present the views of the Supreme Court of the United States, and of the authorities, supporting to the full extent, the construction of the statute, for which we are contending. In the first place, we make the point and urge it with emphasis, that whatever the meaning of the statute, its language and therefore its signification, applies indiscriminately and without distinction to both "prior offenses" and *subsequent offenses*. They are equally within the reason

and the purpose of the statute, and are certainly equally within the language of the enactment,—giving to the language a normal and logical interpretation. In the case of *Cosgrove* v. *Winney,* 174 U. S., 64, the court quotes the statute and following the interpretation given to it in the *Rauscher case,* holds that it prohibits the trial and prosecution of the accused on any and every charge other than the one specified in the particular extradition, and suggests no exception in favor of such a prosecution when based upon an alleged subsequent offense. And the court in concluding, uses almost the very language of Judge COOLEY, saying that:

> "Cosgrove retained the right to have the offense for which he was extradited disposed of and then to depart in peace, and that this arrest was in abuse of the high process under which he was originally brought into the United States, and cannot be sustained."

In the *Rauscher case* the court reviewed Sections 5272 and 5275 of the Revised Statutes, and then said:

> "The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party **shall not** be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, *he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought.*" (Italics ours.)

This language clearly excludes an arrest, trial

and prosecution on a subsequent charge of committing a subsequent offense. "He shall not," say the court, "be arrested or tried for any other offense." Surely a charge of committing an offense subsequently to the extradition surrender is a charge of committing *another offense;* therefore to arrest and try him on such other charge while the extradition case is pending and awaiting trial to a final conclusion, and before the expiration of his right to return to the country of asylum is clearly a violation of the statute.

Suppose he had been given a trial to a final conclusion of the extradition charge and was acquitted, and he then at once proceeded to return to the country of asylum, but was intercepted, arrested, detained, put to trial, convicted and sentenced to imprisonment for fourteen years on a subsequent charge of committing a subsequent offense while on trial in the extradition case. Would this be permitting him to "return *unmolested* to the country from which he was brought?" Manifestly *not.* Now, if such a subsequent arrest and prosecution would be a violation of the *statute* when occurring immediately after the acquittal of the accused, and before he had an opportunity to return to the country of asylum, then *a multo fortiori,* it would be a violation of the statute to arrest him on the subsequent charge, and prosecute him to conviction and sentence, while the extradition case was pending and awaiting trial to a final conclusion, and while the extradition jurisdiction over his person, persisted and continued in the full supremacy and exclusive control resulting from *its supreme power and authority, for the pur-*

pose of carrying out and executing the requirements of the treaty,—the supreme law of the land.

It is true, the statute as well as the decision in the Rauscher case, preceded the convention of 1889, but without going into further discussion of a point fully presented already, in this brief, there is no conflict, and no repeal of the statute by implication.

United States v. *Lee Yen Tai*, 185 U. S., 213.

Johnson v. *Browne*, 205 U. S., 309.

Say the court in the last cited case:

> "In addition to the provisions of the treaty of 1889, we find still in existence the already mentioned sections (5272 and 5275) of the Revised Statutes, which prohibit a person's arrest or trial for any other offense than that with which he was charged in the extradition proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought."

And replying to the point that Section 5275 of the Revised Statutes of the United States is by implication repealed by the convention of 1889, the court say:

> "These sections (referring to 5272 and 5275) are not incompatible with the treaty or in any way inconsistent therewith. We find nothing in the treaty which provides that a person shall be surrendered for one offense and then that he may be punished (prosecuted) for another."

And the court lay down the rule as to implied repeals in the following explicit terms:

> "Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication unless

the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty."

We have repeatedly pointed out that there is nothing in Article 3 of the convention of 1889 which can be construed to confer authority to prosecute so-called subsequent offenses, *while the extradition case is pending and awaiting trial to a final conclusion, or while the extradition jurisdiction over the person of the accused, persists and continues in full force and effect for the purpose of carrying out and executing the requirements of the treaty*, the supreme law of the land. Nor is there anything in Article 3 of the convention of 1889 which can be construed to confer authority to prosecute the accused on a subsequent charge of committing a subsequent offense, extraditable in character, without the necessity of a *new* extradition; and no one ever supposed that the treaty or the statute at any time were held or could be held to prohibit absolutely the prosecution of subsequent offenses, extraditable in character, or ever could be construed as extending to them, the immunity granted the accused against the prosecution of "prior offenses." This then most effectually disposes of the suggestion made by the Supreme Court of California, and of the point made by those acting for the state, that the convention of 1889, in Article 3, works an implied repeal of the statute and of the treaty of 1842, simply because there is nothing in the provisions of Article 2 prohibiting a prosecution of a subsequent charge of committing a subsequent offense, and there is such a prohibition in that article, against the prosecu-

tion of the accused on a charge of committing a "prior offense."

We trust we have made it sufficiently clear in this brief, that at most, Article 3 can only be construed as denying to the accused, on a prosecution for a subsequent offense, the immunity it grants him against prosecution for a "prior offense." The only consequence of this is that subsequent offenses, if extraditable, can be prosecuted; no one contended they could not. But they can only be prosecuted *after* the final disposition of the extradition case and *after* the accused has been given a reasonable time and opportunity to return to the country of asylum, after his final release on the charge upon which he was extradited. There is nothing in Article 3, nor in any other provision of the convention of 1889 which can by any possibility be construed to the contrary, or can rationally be claimed in conflict with or repugnant to these views. To hold, as does the State Supreme Court, that the subsequent prosecution is permissible and maintainable *while the extradition case is pending, is to make the treaty defeat and nullify the very jurisdiction it has created for the sole and special purpose of carrying out and executing its own requirements. It is thus made to stultify itself.*

The result is the same in construing the provisions or the absence of provision in Article 3, as authorizing not simply a prosecution of a charge of committing a "subsequent offense," but a prosecution without the necessity of a *new* extradition, where the alleged subsequent offense is extraditable in character, thereby cutting off the supreme and funda-

mental right to return, and destroying the protection of the "sovereign right of asylum," *reserved* to the accused, as inseparable to the extradition, and depriving the nation granting the extradition of the prerogative incidental to its sovereignty and guaranteed by the *treaty*, to first determine from the evidence adduced by the prosecuting state, whether the "right of asylum" should be again modified or abridged so as to authorize the trial and prosecution of the accused on the subsequent charge of committing the subsequent offense; and considering further that the accused is deemed in law to be actually resident and physically present within the territory of the nation granting the extradition, as to all prosecutions and charges not specified in the extradition proceedings,—a proposition also fully sustained by the many authorities cited and quoted in this brief, a prosecution against him on a subsequent charge of committing a subsequent and extraditable offense, without first obtaining for such prosecution *the authority of a new extradition, is an aggravated invasion of the asylum reserved to the accused.* It is inconceivable that the necessity for a *new* extradition can be dispensed with, unless the *treaty* contain some such provision as that which constitutes resolution No. 23 of the Institute of International Law, heretofore in this brief quoted in full.

It must also be remembered that no power to prosecute "subsequent offenses," while the extradition jurisdiction exists over the person of the accused; and no power to prosecute them when extraditable, without the necessity of first obtaining the authority of a *new* extradition, can be taken nor de-

rived by implication. (Pomeroy on International Law, § 199. Twiss on Law of Nations, § 223.)

We pass to the further citation of authorities in support of the construction we insist must in law be given to Section 5275 of the Revised Statutes of the United States.. *Spear,* in his treatise on Extradition, discussing the meaning of the statute, very clearly, and, we think, conclusively, establishes the correctness of the position we urge. He says:

> "This statute (Rev. Stat. U. S., § 5275) originally enacted by congress in 1869, takes up the case at the point of the delivery of the fugitive criminal, and then provides in the president the authority for his transportation to this country, his safe-keeping and protection against lawless violence, until the terminus of the case in his discharge from custody or imprisonment for the crimes or offenses 'specified in the warrant of extradition,' and for a reasonable time thereafter. This 'warrant' was issued by the government that made the delivery; and the assumption of the statute is that it would state the crime or crimes, on the charge and proof of which the delivery was made, and, further, that the party being delivered would be tried *only* 'for the crimes or offenses specified in the warrant.'
>
> "Congress in enacting the law clearly had no idea of any other trial under the custody thus acquired, than that relating to the crimes designated in the extradition warrant. The law in its phraseology is constructed upon the theory that the custody is to be used for this single purpose, and not to be extended to a trial for offenses not charged nor proved in the proceedings, and not 'specified in the warrant of extradition.' The fact that the president is authorized to protect the fugitive against lawless violence *until the conclusion of his trial,* and until his discharge from custody or imprisonment,

and 'for a reasonable time thereafter,' shows that Congress regarded the case as a *special* one not falling into the ordinary category of persons arrested, tried and punished for crime. No such provision would have been made if the whole case, after the delivery, were simply one of municipal law, and had no relation to a custody granted by a foreign government under a treaty, and involved no obligation in respect to the use thereof. The theory of the legislation is that the United States, in obtaining the extradition of a fugitive criminal, *acquires no more power over his person than that which results from the treaty.*" (The italics are ours. (Spear on Extradition, pages 232, 233.)

In view of the principles and doctrines of international law upon the subject and as they are stated by the many authorities already cited and quoted in this brief, Mr. Spear probably intended to say with more accuracy, that the theory of the legislation is that the United States, in obtaining the extradition, can acquire no more power over the person of the accused than that which results from the *treaty*. In an earlier part of his treatise, he says in commenting upon Section 5275 of the Revised Statutes of the United States:

> "Nothing can be plainer than that Congress, when enacting this law, had no idea that the party delivered up to the United States would or could be tried for any other crimes than those 'specified in the warrant of extradition.' This is the only trial referred to in the statute; *it is the only trial of which Congress thought as following the extradition; and nothing can be more foreign to the clear implication of the language than the idea that the case admits of any other trial.* (Italics ours.) The understanding of Congress is distinctly indicated by the words

used and not the less significantly because it incidentally appears. It is a well settled rule in the construction of statutes that when they affirmatively specify they exclude everything not specified. As to things not specified, 'the negative is implied as distinctly as if it were expressly declared.'"

(This is emphatically true as to subsequent prosecutions for subsequent offenses; besides this, it is well settled that the power to prosecute such offenses, while the extradition jurisdiction exists over the person of the accused; and the power to prosecute them where they are extraditable, without the necessity of first obtaining the authority of a *new* extradition, cannot be taken nor derived by implication. Pomeroy on International Law, § 199. Twiss on Law of Nations, § 223.)

> "This rule excludes any trial for crimes and offenses other than those 'specified in the warrant of extradition.' The supposition that the extradited party may be tried for any *other* offenses, within or without the list of extradition crimes, not the subject of the extradition, is utterly inconsistent with the language used by Congress." (Spear on Extradition, page 126.)

Surely this is very convincing as against the contention set up by the state authorities in our case, and fully supports the point we make that our imprisonment is in violation of the *statute* as well of the treaty.

In a very well considered case, before the Supreme Court of New York, the court say:

> "Before the supplemental treaty of 1889 was made, that of 1842 was in many cases so construed as not to permit the trial of a person delivered up in execution of the treaty, for any

offense other than that for which he was extradited *while his custody, taken by such surrender, continued.* (*Commonwealth* v. *Hawes*, 13 Bush., 697; 26 Am. Rep., 242; *State* v. *Vanderpool*, 39 Ohio St., 273; 48 Am. Rep., 431; *Ex parte Hibbs*, 26 Fed. Rep., 421, 431.) *And such is the import of the federal statute on the subject.*" (U. S. R. S., §§ 5272, 5275.) The italics are ours.

The foregoing excerpt is taken from the opinion of the court in the *habeas corpus* case of *People* v. *Stout*, 81 Hun. 339, where the prisoner having been extradited on one charge and convicted and sentenced on another, was discharged on *habeas corpus*, and this ruling was subsequently affirmed by the New York Court of Appeals.

In another case in the same state, the court had occasion to seek and ascertain the true meaning of the construction placed upon Section 5275 of the Revised Statutes of the United States, in the *Rauscher case*, and said:

"Much stress was laid in that decision, and very properly, upon the fact that, by the act of congress relating to extradition from foreign nations upon the application of the Federal Government, *it is expressly provided that the person surrendered shall not, when brought to this country, be tried for any other or different offense.* (Italics ours.) This is the construction given to the act in the case last cited. 119 U. S., p. 433; U. S. R. S., § 5275. The Act of Congress, passed in pursuance of the Federal Constitution, is the supreme law of the land, and this law protected Rauscher from trial for any other offense than the one upon which he was surrendered to this government by the British authorities. * * * It may be proper to add, also, that the Act of Congress regulating interstate extradition, does not provide that the fugi-

> tive surrendered *shall be exempt from trial upon any other charge, while that regulating international extradition does*, according to the construction given to it by the highest Federal court, as we have seen." (Italics ours.)

This is taken from the opinion of the court in *People* v. *Cross*, 135 N. Y., 540, 542.

In a case before the Supreme Court of Massachusetts, the court said that Section 5275 of the Revised Statutes of the United States implies that the accused is

> "to be tried *only for the specific offense for which he has been surrendered*, unless he voluntarily remains within the United States; and the modern practice of most foreign nations, and the opinions of the most recent text writers on international law tend to support this view of the *duty* (italics ours) imposed by a treaty of extradition, and of the rights acquired by the accused under it and the statutes, passed to carry such treaties into effect." *Commonwealth* v. *Wright*, 158 Mass., 154.

In a case in Georgia, afterwards affirmed in the Supreme Court of the United States, the highest court of that state say:

> "The limitation which exists in cases of foreign extradition is matter of express law. By the Act of Congress of March 3, 1869, c. 141, § 1, as construed in the Rauscher case, it is provided that the accused *shall be tried only for the crime specified in the warrant of extradition* (italics ours) and shall be allowed a reasonable time to depart out of the United States before he can be arrested or detained for another offense. It is significant that Congress while thus careful to secure to the fugitive the right of return in cases of extradition from a foreign country, has made no provision with reference to persons surren-

dered from one state of the Union to another." *Lascellas* v. *State*, 90 Ga., 363.

In his specially concurring opinion in the Rauscher case, Mr. Justice GRAY bases his judgment exclusively upon the statute, and his carefully prepared opinion fully sustains the contention we make in support of our claim that the imprisonment is unlawful. He said he concurred in the result,

> "upon the simple ground that by the Act of Congress of March 3, 1869, Chap. 141, Sec. 1 (embodied in § 5275 of the Revised Statutes), providing measures by which any person, delivered up by a foreign government for the purpose of being tried here for a crime of which he has been accused, may be secured against lawless violence 'until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter,' the political department of the government has clearly manifested its will, in the form of an express law (of which any person prosecuted in any court within the United States has the right to claim the protection), *that the accused shall be tried only for the crime specified in the warrant of extradition*, and shall be allowed a reasonable time to depart out of the United States, *before he can be arrested or detained for another offense*." (The italics are ours.)

Nothing could be clearer nor more decisive; and the mind that can find in this very lucid interpretation and explanation of the statute, any the least countenance for the existence of the essentially arbitrary distinction taken by the State Supreme Court between prior and subsequent offenses, is indeed bereft of all the constituents necessary to form an

intelligent and a rational conclusion on any subject. The State Supreme Court makes no reference to the opinion of Mr. Justice Gray, but sweeps aside the statute and says it does not apply.

No one will impute to the very eminent jurist who wrote the specially concurring opinion in the Rauscher case, the ill-advised or reckless use of language; emphatically with him, "words are things, and those who use them improperly mislead themselves as well as others" (Per Black, C. J., in Hilltown Road Case, 18 Penn. St., 234); and his opinions all disclose the cautious and exceedingly appropriate selection of fitting and well measured words in expressing the conclusions of a mind eminently distinguished for great precision and profound learning. He had before him a statute to be first interpreted and construed to ascertain the intent of congress. The process involved no reference whatever to the special or adventitious facts in the Rauscher case, nor in any other case. The intent of congress was to be ascertained primarily from the language in which the enactment is expressed, as viewed in the light of the pre-existing principles and doctrines of international law. And the meaning which Mr. Justice Gray in the light of his great learning, and by the powerful logic of his mind, evolved from the terms of the statute is that the accused can *only* be brought to trial on the specific charge on which he was extradited, and when released upon *that* he is entitled to a reasonable time to depart out of the United States "*before he can be arrested or detained for another offense.*"

Now, mark you, not "for another offense," com-

mitted prior to his extradition, but for any other offense, irrespective of whether it be a prior or subsequent offense. It would be changing the statute entirely to insert in it any such distinction,—a distinction which we have shown in this brief, is contrary to all the authorities, and essentially arbitrary. And even if it were possible for such a distinction to be taken, and in reason and principle it is not, surely it could not be so construed and applied as to permit of the different prosecution on the subsequent charge of committing a subsequent offense, *while the extradition case is pending and waiting trial to a final conclusion, and while the extradition jurisdiction over the person of the accused persists and continues in its supreme and exclusive authority, for the purpose of carrying into effect and executing the requirements of the treaty,—the supreme law of the land.* Nor could any such distinction, if introduced into the statute, be construed to permit of the subsequent prosecution, without the necessity of a *new* extradition, where the alleged subsequent offense is extraditable. Nor could the requisite authority to prosecute the subsequent offense be taken nor derived by implication or construction. In addition to all this, such a distinction as that set up by the State Supreme Court is absolutely inconsistent with and repugnant to the plain and explicit language of the statute.

The requirement of a trial to a final conclusion of the extradition charge and the prohibition against any trial upon any other charge is specially designed to make available to the accused, and to protect from interference, interruption or postponement

his right to return to the country of asylum on his acquittal of the charge on which he was extradited; and is designed to secure this right to him in regular and consecutive order, free and untrammeled, at the earliest practicable moment; and this in first and primary obedience to the requirements of the *treaty* and of Section 5275 of the Revised Statutes of the United States,—the supreme law of the land.

The statute, its protection and the rights it confers, attach to the accused the moment he is brought within the United States, and necessarily *from that time* continue in full force and effect (to quote the language of the statute),

> "until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter."

The statute is the supreme law of the land; and the power and authority of the United States over the subject, are not only *exclusive* of the several states, but the latter are explicitly prohibited by the Constitution from interfering.

Now, in view of all this, how can it be said that the states have a shadow or vestige of power remaining, to seize the accused, put him on trial, convict and sentence him on a subsequent charge of committing a subsequent and extraditable offense, and do this, too, while he is under the protection of the federal statute, and having the rights which the statute confers upon him,—rights clearly pointed out and defined in the opinion of Mr. Justice Gray.

Does the law of the extradition prescribe the time when the accused can be prosecuted and put on trial on any other charge? If it does, and surely it would be more than passing strange if it did not, then being the supreme law of the land, no such prosecution can be maintained until the time so specified arrives. Now the law of the extradition provides that if the accused on being finally released on the charge upon which he has been extradited, does not within a reasonable time thereafter return to the protection of the country of asylum, he can legally be prosecuted on any offense, prior or subsequent; and that if he does return to the country of asylum within the prescribed time, he may then be prosecuted on a charge of committing an offense subsequently to the extradition surrender, but only on a *new* extradition pursuant to the terms and conditions of the *treaty*, if the subsequent offense is extraditable; otherwise he is entitled to the protection of the "sovereign right of asylum."

There is nothing whatever in all this, in the slightest degree inconsistent with the provisions of Article 3 of the convention of 1889. As already repeatedly pointed out in this brief, that provision in conferring immunity as to "prior offenses" only, is not a provision that subsequent offenses can be prosecuted *while the extradition case is pending and awaiting trial to a final conclusion*, thus making the treaty defeat the very jurisdiction it has specially created for the purpose of carying out and executing its requirements; nor is it a provision that subsequent offenses, extraditable in character, can be prosecuted without the necessity of a *new* extradi-

tion. And in no event can authority to prosecute subsequent offenses be taken or derived by implication nor by inference from the provisions of Article 3 of the convention of 1889. Both Article 3 and Section 5275 of the Revised Statutes must be construed together; the latter is sufficiently comprehensive to cover, and it does cover both prior and subsequent offenses. Any construction that would make them conflicting is entirely inadmissible as against the one that renders them consistent and harmonious not only with each other, but with the pre-existing and well established principles of international law. The contrary construction suggested and followed by the State Supreme Court proceeds fundamentally and primarily on a very strange confusion of thoughts and ideas of an essentially diverse nature; and this confusion arises, no doubt, from a want of familiarity with the principles and doctrines pertaining to the subject presented. As already repeatedly pointed out in this brief, it would not only be ridiculous but insane to include subsequent offenses in an immunity clause such as Article 3 of the Act of 1889. It is a provision, therefore, intrinsically entirely foreign to the question, and must be so regarded. It simply means that if the accused return to the country of asylum within the prescribed time, he cannot be prosecuted at all for any prior offense, since offenses of that class are then concluded by the particular extradition. On the other hand, the clause in question does not and in reason cannot include subsequent offenses, which, of course, are subject to prosecution in the manner prescribed by law. There is absolutely nothing in Article 3 of the convention of 1889 to the contrary.

The maxim—always, say the authorities, to be applied with caution,—*expressio unius est exclusio alterius,* cannot apply, as subsequent offenses do not come within the same category as prior offenses in respect to immunity from prosecution in the event the accused returns to the country of asylum within the prescribed time; for, if the subsequent offense is extraditable, it can be prosecuted on a *new* extradition; but the "prior offense" cannot. If the accused fails to return within the time limited to the country of asylum, he can lawfully be prosecuted on all offenses prior and subsequent, extraditable or not.

Aside from this, it must be continually borne in mind that even indulging the impossible assumption that Article 2 of the convention of 1889, does provide for the prosecution of subsequent offenses, and that this results by implication, and assuming still further that you can take such authority by implication, there surely is nothing even then in all this, permitting the prosecution of the subsequent offense, *while the extradition case is pending and awaiting trial to a final conclusion, and thus making the treaty frustrate and defeat itself;* nor is there anything to permit the prosecution without the necessity of a *new* extradition, when the alleged subsequent offense is extraditable in character. And to save the extradition jurisdiction from destruction, it would be perfectly proper and in accord with established canons of construction to hold, if necessary, that Article 3 of the convention of 1889, in referring to offenses "committed prior to his extradition," instead as in the British extradition Act, "prior to his

surrender," means that every offense prior to the final termination of the extradition case, is included, as the *extradition* does not end until the case itself is finally disposed of, the "surrender" being but a step in the extradition. The difference in phraseology between Article 3 in the convention of 1889, and the British extradition act, amply justifies the construction suggested, were it necessary (and it is not) to preserve and maintain the integrity of the treaty and the supremacy of the extradition jurisdiction; such a construction would be especially appropriate in the case at bar, for reasons obvious and self-evident.

Now, as to the Federal statute. Of course, in the presence of the supreme law, the laws of the State of California, especially those relating to the acquisition of the necessary jurisdiction over the person of the accused in respect to the subsequent charge of committing a subsequent offense, and the authority of the state court to try him on the charge, are absolutely silent and inoperative; in law, are devoid of all force and effect.

The maxim is, *In praesentia majoris cessat potentia minoris.* It follows that the state court acquired no *jurisdiction* over the person of the accused on his trial, prosecution, conviction and sentence upon the second charge of perjury. Its proceedings on that charge are *coram non judice*, and in violation of both the treaty and Section 5275 of the Revised Statutes of the United States. The resulting imprisonment is unlawful for the same reasons. This conclusion is certainly incontrovertibly sustained by principle and authority as shown to a demonstration in this

brief. In the extradition case the imprisonment there has also been clearly and incontrovertibly established to be in violation of both the *treaty* and the Federal statute, first, because the accused was not brought to trial to a final conclusion upon the extradition charge, *within a reasonable time,* and in consequence, according to the authorities cited on the point, the indictment has become void; the jurisdiction over his person, under the warrant of extradition, has ceased and terminated, and he is entitled to his liberty; secondly, the warrant of extradition confers no authority on the sheriff of San Francisco to hold him in custody; the warrant does not run to the sheriff, and he has never been appointed by the United States to hold the custody.

All these propositions have been very elaborately discussed in this brief, and we are certainly warranted in saying that they are fully sustained by the many authorities we have cited and quoted. In conclusion, the imprisonment of the accused is, and according to all the authorities must be exclusively controlled by the *warrant of extradition.* The law governing the custody is as much a part of the warrant as if written therein in terms express and mandatory. Therefore the warrant must be construed precisely as if it read:

> "That the accused shall be held in custody for the sole and only purpose of giving him a trial to a final conclusion, and within a reasonable time, upon the specific charge herein designated and upon which his extradition is granted, and upon no other charge shall he be brought to trial or prosecuted until after he has first had a reasonable time and opportunity subsequently to his final release or trial upon said charge on

> which he is hereby extradited, to return to the country granting his extradition, and has failed so to do. And, provided further, that at no time prior to said expiration of his said right to return shall he be prosecuted, imprisoned nor placed on trial for or on account of any charge whatsoever other than the said charge in this warrant designated, and for which and upon which the said extradition has been granted."

There can be no dispute that the authorities we have cited and quoted fix these as the terms and conditions of the extradition; the warrant of extradition as thus construed correctly in response to the *treaty* and in conformity with the provisions of Section 5275 of the Revised Statutes of the United States, defines, limits and measures the jurisdiction over the person of the accused, and that jurisdiction is beyond question, *supreme and exclusive*, for it emanates from and is created by the supreme law of the land. It results that on both principle and authority our contention is right, that the imprisonment of the appellant and plaintiff in error, is in violation of the terms and conditions of the warrant of extradition, as above set forth, and in violation of the *treaty*, in violation of Section 5275 of the Revised Statutes of the United States, in violation of international law, and in violation of the Constitution of the United States in the particulars pointed out in this brief.

We respectfully present and urge the appropriate prayer in each case, for the *reversal* of each of the judgments, to wit: the judgment of the Supreme Court of the State of California, specified in the writ of error, and the judgment of the Circuit Court of

the United States, Ninth Judicial Circuit, Northern District of California, from which the appeal is taken. We respectfully request that suitable direction and instruction accompany the *reversal* of the judgments, and requiring the discharge of the appellant and plaintiff in error from imprisonment, *and restoring him to his liberty.* All of which is most respectfully submitted.

GEORGE D. COLLINS,

Counsel for the Appellant and for the Plaintiff in Error.

Dated at San Francisco, November, A. D. 1908.

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JAMES H. McKENNEY,
CLERK.

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IN THE

SUPREME COURT OF THE UNITED STATES.

GEORGE D. COLLINS,
Plaintiff in Error,
vs.
THOMAS F. O'NEIL, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA,
Defendants in Error.

No. 241.
OCTOBER TERM, A. D. 1908.

(IN ERROR TO SUPREME COURT OF CALIFORNIA.)

GEORGE D. COLLINS,
Appellant,
vs.
THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA,
Appellees.

No. 320.
OCTOBER TERM, A. D. 1908.

(APPEAL FROM UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.)

Final Argument for Appellant and Plaintiff in Error.

GEORGE D. COLLINS,
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APPEAL FROM UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

Final Argument for Appellant and Plaintiff in Error.

This argument is presented in connection with that urged in the Brief. We preface the argument with the comprehensive point that the decision of both the lower courts is in the last analysis, to the effect and culminates in the result that no rights are conferred on the accused, nor obligation imposed in his favor, by the treaty of extradition nor by Section 5275 of the Revised Statutes of the United States, nor by international law; and that the extradition jurisdiction established by both the treaty and the statute over his person, is not supreme and exclusive, but subordinate and inferior to and can be absolutely nullified by the laws and the judicial process of the State of California, notwithstanding the sixth article of the Constitution of the United States, and notwithstanding the fundamental principle that the custody of the accused derived alone from his extradition, cannot be used for a purpose different from that authorized in the special case, by the treaty and the statute, at least not while the charge on which he was extradited, is pending and awaiting trial to a final conclusion. The lower courts also decide that the accused can be perpetually imprisoned in the extradition case, without trial, and that such imprisonment is not unlawful. We desire to urge with great emphasis that every right conferred on the accused by the law of his extradition, —the supreme law of the land, has been virtually denied and repudiated in the decisions rendered against his right to his liberty. If the views of the lower courts are the law, "it will be found in our books; if it is not to be found there, it is not law." Lord Camden in *Entick* v. *Carrington*, 19 Howell

State Trials, 1029, approved in *Boyd* v. *United States*, 116 U. S., 627. It will be found that not only there is no case in the books to sustain the decisions in question, but that the law is exactly to the contrary, on both principle and authority.

I.

OPENING STATEMENT.

The essential facts of the case are as follows: The appellant and plaintiff in error was extradited in October, 1905 (more than three years ago), from Canada, pursuant alone to the treaty of extradition between Great Britain and the United States, for trial in the Superior Court at San Francisco upon a specific and specially described charge of perjury laid in the indictment as having been committed on June 30, 1905, in verifying by his oath, before a notary public, the general issue in a civil suit wherein he was defendant, and at that date pending in the state court; the suit never had a *bona fide* purpose and has never been brought to trial, nor set down for trial. Instead of pursuing the only legitimate and proper course of a trial of the issue as to the truth or falsity of the oath, *in the case where it was presented*, the plaintiff had recourse to a criminal prosecution; the defendant having previously become a resident of Canada, was extradited on the specific charge subsequently made, that this oath in the civil suit, tendering issue in the case, was untrue and constituted perjury. The civil suit was then abandoned and the extra-

dition case was substituted. The fact of the matter is that the extradition was merely a pretense and pretext to bring the accused back to San Francisco for ulterior purposes of an infamous conspiracy against him and against his rights. *In November, 1905*, the extradition case was brought to trial before the Superior Court in San Francisco; after a protracted hearing the jury disagreed on December 22, 1905, and were by the court discharged; the case was set for further trial on a day early in the following month. Before the date so set arrived, and on December 29, 1905, just one week after the jury disagreed, the prosecution procured and filed in the same court another and altogether different indictment against the extradited accused, charging him with another and different offense of perjury, alleging that it was committed by him on December 12, 1905, in testifying as a witness in his own behalf on the mistrial of the extradition case. *The matters assigned as perjury in this second indictment are of such character that acquittal on the extradition charge would be res adjudicata of an essential element involved in, and be a bar to the prosecution on the second indictment.* The point is fully discussed and the authorities cited in the Brief, page 67 and following. Over our objection, this second charge was substituted for the extradition case and prosecuted to judgment and sentence of fourteen years' imprisonment. The result accomplished in prosecuting to a final conclusion, to sentence and judgment, the second indictment to the exclusion and in subversion of the extradition case, was a fraudulent deprivation of the fundamental rights conferred on

the accused by the *treaty* and by Section 5275 of the Revised Statutes of the United States—the supreme law of the land. It was an unlawful substitution in fraud of the *treaty rights* of the accused, of the local prosecution on the second indictment,—to the virtual extinction of the extradition case. The facts are all established by the record, and they show beyond dispute that on December 29, 1905, the accused, while under the paramount protection of the law and jurisdiction of the extradition, was *arrested* on the second indictment (Rec., writ of error, 16); the second charge was then very diligently pressed and prosecuted to a final conclusion, to judgment and sentence, March 10, 1906, of fourteen years in the state penitentiary—the maximum penalty. The extradition case was dropped, its prosecution discontinued and abandoned; the second accusation substituted. At every step in these manifestly unlawful proceedings, from the arrest to and including the sentence on the second indictment, the accused vigorously and persistently objected and protested, invoking continually in that behalf, and at every step, the rights supreme and paramount granted him by the treaty of extradition between the United States and Great Britain and by Section 5275 of the Revised Statutes and by international law; but the state courts summarily overruled and rejected all his objections and protests, and went ahead with the second prosecution, despite his *treaty rights*. The judgment and sentence on the second indictment have been affirmed on appeal in the state court, and are final. The extradition case is still pending and undisposed of, now three years and more; it drags

forth its lengthened shadows in mockery and delusion; the accused is still being imprisoned in the common jail at San Francisco, on the assumed authority of the defunct warrant of extradition. There has been no trial of the extradition case, not even an effort of the prosecution to bring it to trial, since the jury disagreed on *December 22, 1905*, and the often repeated demands of the accused for a trial of the case to a final conclusion have all been overruled and refused. His imprisonment upon the warrant of extradition is manifestly indefinite and perpetual. The record shows affirmatively that the extradition case could have been given the necessary trial instead of the indictment of December 29, 1905, and could have been brought to trial in January, February or March, 1906, or at any time since, except during a few days in April, 1906, when the papers in the case were not available, having been destroyed by fire. These papers, however, could have been restored the same month, as the record states, but were not actually restored by the prosecution until a year and four months subsequently. There was no reason or excuse for this delay and none has been suggested. Nor has the restoration of the papers operated to infuse any life into the long previously defunct obligation to prosecute the extradition case; it still lays dormant—and is quite impossible of legal restoration; the disintegrating process of lasting inanition has made it vanish forever, but, as stated, the accused is still imprisoned on the charge upon which he was extradited, *and has been permanently refused trial.* It is now three years and more, as shown by the record, since the state Supe-

rior Court positively and peremptorily refused to grant him a further trial of the extradition case and ordered it indefinitely postponed, despite his objections and remonstrance expressly predicated on the *treaty* and Section 5275 of the Revised Statutes of the United States. It is manifest from the record that the further prosecution of the extradition case has been abandoned *in the sense that it has not been brought to trial to a final conclusion within a reasonable time*, and that no good cause or excuse exists for the wilful and deliberate suspension of its prosecution to a finality; there is no justification in law for the perpetual imprisonment of the accused, without trial, on the international warrant of extradition. The only object of the warrant was to bring the accused to trial to a final conclusion and within a reasonable time, on the charge upon which he was extradited. As this trial has been absolutely refused (the record is positive on that proposition), it results that he is entitled to his liberty; it is his legal right, derived from the supreme law of the land, to "depart in peace." The failure to prosecute the extradition case within *sixty days* after the disagreement of the jury entitles the accused, under the law of California, to his discharge on *habeas corpus*. So held by the state Supreme Court in *Ex parte Begerow*, 133 Cal., 349. This fixes by convenient analogy the period of reasonable time within which the accused must be brought to trial in California, in cases of international extradition, or else be discharged. His right is derived from the treaty and from Section 5275 of the Revised Statutes of the United States.

It will be understood, then, that on the case presented by the record, it is established that the accused is deprived of his liberty by the sheriff of San Francisco, acting for the State of California, under claim of authority solely consisting, first, in the judgment and sentence on the indictment of December 29, 1905—a lawless proceeding, absolutely void because *de hors* and in violation of the extradition; secondly, on the assumed authority of the warrant of extradition which has long since expired by limitation of law and which, even were it now operative, confers no authority on the sheriff, as it does not run to him nor grant him any power to imprison the accused. The fantastic and lawless manipulation and legerdemain by which the prosecution of the indictment of December 29, 1905, has been made to prevail over the supremacy of the extradition, and to the extinction of the paramount rights of the accused, vested in him by the treaty and Section 5275 of the Revised Statutes, the supreme law of the land, are scarcely worthy of passing criticism. The novelty of the thing (*it is entirely without sustaining precedent*) seems to have possessed the state authorities with an enchanting and irresistible impulse to override the supreme law, and substitute the inferior and subjective power of the state. It is probably an experimental innovation, very characteristic of government in California—as history teaches. It is certainly unconstitutional.

The case comes before the Supreme Court of the United States on a writ of error to the Supreme Court of California, directed to its judgment of date May 22, 1907, on *habeas corpus*, remanding the ac-

cused to the custody of the sheriff on both the judgment of conviction and the warrant of extradition. The case also comes before the court on an appeal from the judgment of the United States Circuit Court, Northern District of California, refusing to grant the writ of *habeas corpus*.

All possible questions as to the jurisdiction of the Supreme Court of the United States on both the writ of error and the appeal, and the points as to the jurisdiction and duty of the United States Circuit Court to grant the writ of *habeas corpus* on the showing made, are fully presented and discussed and the authorities cited in the Brief, pages 13, 14, and 43 to 53. The case is properly, and in its entirety, now before the Supreme Court of the United States for final determination on its merits, upon a full and complete record (see Brief, pages 13 and 14), amply supporting all the points relied upon and urged by the appellant and plaintiff in error to sustain his claim that his imprisonment is in manifest violation of the treaty of extradition between the United States and Great Britain; in violation of Section 5275 of the Revised Statutes of the United States; in violation of international law, and in violation of the Fourteenth Amendment and of Article VI of the Constitution of the United States.

It is our contention, stated generally, that on the facts presented in the record, the state is absolutely deprived of all power to proceed against the accused or to hold him in custody upon any criminal charge whatever other than the one specified in the extradition case; and that as to the latter, the process has become *functus officio* and has expired by lim-

itation of time. The *treaty* is both the source and measure of the entire power of the prosecuting state over the person of the accused, and being a power derivative, special and limited, must be strictly pursued in order to maintain the delegated jurisdiction. Any deviation from the prescribed authority is an excess of power. Without the treaty and the proceedings had pursuant to its provisions, the state could acquire no jurisdiction at all over the accused. Having invoked the treaty and by its authority solely and exclusively secured the presence of the accused within its territory *for the purpose of a specific criminal prosecution*, the state is strictly confined, in its exercise of power over him, to the special case for the trial of which the treaty alone authorized his transfer and surrender. As to any and all other matters the state is denied by the *treaty* all jurisdiction over his person, and must permit him to return to the country of asylum, must afford him reasonable time and opportunity to so return, before proceeding and arresting him upon another and different charge. This is the only possible method of keeping faith with the treaty. As pointed out by Lord Derby in the *Winslow case* (Foreign Rel. U. S., 1876, p. 278), the person extradited is simply "lent" to the prosecuting state on condition that his custody be only used in the case specified; and that when this has been done, or a reasonable time has elapsed, adequate for the purpose, and it has not been done, then that the accused be permitted to return without further detention or molestation to the country of asylum, the country that had "lent" him for the

special and limited purpose prescribed by the treaty. A special bailment for a special purpose, with reversion to the country of asylum. It may be likened to a special declaration in trust for a specified purpose, with reversion to the country of asylum when the purpose designated has been accomplished, or a reasonable time has elapsed, and the trust has not been performed. Manifestly, it would be no answer to the non-performance of the obligation of the trustee to say that the subject of the trust was wanted in detention on a matter entirely foreign to the trust, and therefore must not be restored. This would simply be a repudiation of the trust. And even if there were no reversion prescribed, still the trustee's obligation to devote the subject delivered to the purpose of the trust pursuant to which possession had been alone obtained, would *per se* prohibit any deviation or departure in furtherance of some other object, foreign to the trust. According to all legal conceptions, the trustee must *first* perform the obligations imposed by the trust pursuant to which he obtained possession of the subject he holds in custody; the law of his trust duties is necessarily supreme and paramount over any and every different user of the subject entrusted to him. These are very well understood and quite fundamental doctrines in jurisprudence, not only demanded by common honesty, manifest justice and fair dealing, but essential to sound governmental polity, such as is undoubtedly necessary to the maintenance of honorable intercourse between all civilized nations. These considerations protect the accused against the use of his custody for a purpose foreign to the extradition,

at least while the charge on which he has been extradited is pending and awaiting trial to a final conclusion; and secure to him legal rights enforceable by the writ of *habeas corpus*.

All the obvious duties referred to as being incumbent upon the trustee in the case supposed, have been grossly violated in prosecuting the appellant and plaintiff in error on a charge different from the one upon which he had been extradited, and in not bringing to trial to a final conclusion the extradition case, within a reasonable time after the disagreement of the jury in December, 1905, and in holding him in perpetual imprisonment under the international warrant of extradition, without a trial determinative of the case. We contend also that the warrant of extradition confers no authority on the sheriff to imprison the accused. It does not run to him and on its face requires that the custodian be appointed by the United States, thus the more effectively preserving the rightful control of the law of the extradition and the better enabling the President to protect the accused as provided in Section 5275 of the Revised Statutes of the United States. The sheriff has never been appointed by the United States (Rec., on appeal, 20) and there is no law appointing him. He has no more authority to imprison the accused than is possessed by any other stranger to the process. It seems he acquired the custody through his predecessor in office, who in turn obtained it from Gibson, the agent of the United States, not as erroneously stated in the return "agent of the State of California" (Rec., writ of error, 10); but this erroneous averment in

the return as to Gibson's position, explains how it happened that the accused came into the possession of the sheriff, Gibson being considered merely a representative of the state and the entire extradition proceeding being considered an affair exclusively of the State of California, as though it were simply a case of interstate rendition. The warrant in requiring that the United States make the appointment of the custodian of the accused, denied Gibson any power of appointment. In fact, as shown on the face of the certificate and endorsements on the warrant of extradition appearing in the record, the whole thing was an afterthought and the sheriff did not obtain the process until after the writ of *habeas corpus* issued. The original warrant passed from Gibson, the police officer, to his superior, the chief of police of San Francisco, in whose custody it was when destroyed by fire in April, 1906.

We want to say in reference to the point that the extradition case was refused trial and its prosecution abandoned in favor of the indictment of December 29, 1905, that these facts are averred in the petition for *habeas corpus* and not denied either in the return nor in the special answer to the petition, tendering and defining the issues. (Rec. on appeal, 2, 3 and 4; also page 6 and following. Rec. on writ of error, 3, 4, 7 and 8; also page 11 and following.) These then are deemed admitted facts in the case. *Kohl Lehlback*, 160 U. S., 293. None of the material facts are disputed in the return or in the special answer. What is said by the state Supreme Court as to the relative functions of the petition and return, cannot apply to the special answer pur-

porting to tender and define the issues. The uncontradicted evidence showing the refusal of trial on the extradition charge and the wilful failure to bring the case to trial within a reasonable time and the substitution of the second indictment in its place, to the discontinuance and abandonment of all prosecution of the extradition case, will be found at page 20 and following of the record on the appeal. All the questions we raise are *Federal* in their nature and origin, and pertain to a subject exclusively within the domain of the national sovereignty of the United States. The constitution delegates exclusive power over the subject of international extradition to the nation, and also prohibits the several states from acting in relation to the matter. The constitution makes the treaty of extradition and the federal statute passed to protect the rights of the accused (Section 5275 R. S. U. S.) the supreme law of the land. It is axiomatic that in the presence of the supreme law of the land all pertinent laws and judicial process of the subordinate and subjective state are silent and inoperative; they are for the time being as absolutely devoid of authority as if in fact non-existent. It is a maxim of general jurisprudence that *In praesentia majoris cessat potentia minoris.* Aside from this, it is a monstrous proposition that concedes to the prosecuting state the power to cut off and destroy the right of asylum *reserved to the accused as a condition sine qua non of the preceding extradition,* and in that regard vests authority in the receiving state, to prosecute him on a subsequent charge of committing a subsequent and extraditable offense,

without affording the country of asylum the right or opportunity to protect its sovereignty and in that behalf to first determine whether on the evidence adduced the asylum reserved should be further abridged or withdrawn so as to permit of the subsequent prosecution. This is really and in result placing the right of asylum and the sovereignty of another nation, at the mercy of the state antagonistic to its existence. It is equally monstrous to say that the prosecuting state has power to deprive the accused of his paramount and supreme right to a trial to a final conclusion of the extradition case, within a reasonable time, to the exclusion of any trial or prosecution on any other and different charge, by the scheme of substituting for the extradition case, another indictment on another charge, thereby evading and escaping the obligations imposed by the *treaty* and by Section 5275 of the Revised Statutes of the United States.

All the questions presented are fully covered by appropriate assignments and by adequate specifications of error, the latter set forth at page 14 and following of the Brief.

II.

ENUMERATION OF THE QUESTIONS RAISED.

The principal questions presented for decision are the following:

1. What is the sole and only purpose of a treaty of extradition if it be not to bring the accused to trial to a final conclusion and within a reasonable

time on the specific charge upon which he is extradited; and is this purpose restrictive of the power of the prosecuting state over the accused?

2. What limitation is placed by the treaty of extradition and by Section 5275 of the Revised Statutes of the United States upon the prosecution of the accused on a criminal charge, and is the limitation supreme and paramount or is it subordinate and inferior, and subject to the control of the local laws of the prosecuting state?

3. Has the accused the fundamental right to a trial to a final conclusion of the charge on which he has been extradited, and if he has, does this *per se* negative the power of the prosecuting state to arrest and try him on a charge different from the one specified in the extradition proceedings while the latter are pending and awaiting final determination, and is there any distinction in law between prior and subsequent offenses in the application of the prohibition against the trial of the extradited accused on any charge different from the one specified in the extradition process while the extradition case is pending and awaiting trial to a final conclusion? Here again the question arises, is the law of the extradition supreme and paramount over all the laws and judicial proceedings of the prosecuting state or merely subjective and inferior?

4. Is it competent for the prosecuting state to discontinue the prosecution of the extradition case and divert the extradition custody of the accused to his prosecution on another and different charge? Has the accused the right to return to the country granting his extradition, if acquitted on the extradition

charge, and if he has, does this carry with it the right to an opportunity in due and consecutive course of judicial procedure, to obtain an acquittal, and can either this right or the right to return, be hindered, delayed, postponed, obstructed or destroyed by the prosecuting state, by means of his arrest and trial on another and different charge while the extradition case is pending and awaiting trial to a final conclusion?

5. Is there a right of asylum conferred by the country granting the extradition, and *reserved to the accused as a condition sine qua non of his extradition*, and against every charge and prosecution other than the one specified in the special extradition. And as to any such collateral charge or prosecution, does the law deem the accused, pending his right to return and before its expiration, to constructively be and remain within the territory of the country granting the extradition, with exclusive power and authority in that nation to determine from the evidence adduced whether the asylum *reserved* shall again be abridged or withdrawn to the extent of permitting his arrest and prosecution on a subsequent charge of committing an extraditable offense subsequently to the previous extradition surrender, but before the expiration of the right to return, and is the decision of the country of asylum, conferring authority, under the circumstances stated, an essential pre-requisite to any other prosecution against him?

6. Has the prosecuting state the power to cut off, impair, interfere with, postpone or destroy the fundamental and existing right of the accused to return

to the country of asylum, by arresting and prosecuting him on a charge of committing an offense subsequently to the extradition surrender? Is the right to return conferred by the treaty and Section 5275 of the Revised Statutes, *anterior* to the alleged subsequent offense, supreme and paramount over all the laws and judicial process of the State of California, involved in and the basis of the subsequent prosecution?

7. What is the purpose of the right conferred on the extradited accused to return to the country of asylum on final release upon the extradition charge, if it be not to protect him from prosecution on any and every charge different from the one specified in the extradition proceedings, unless authorized by a new extradition?

8. Is it a fraud on the *treaty*, and on the rights of the accused, conferred by the treaty and by Section 5275 of the Revised Statutes of the United States for the prosecuting state to drop and discontinue the prosecution of the extradition case, and thereupon substitute in its place a different prosecution, and seize the person of the accused upon another and different charge, thus cutting off his right to return to the country of asylum, and also destroying his right to a trial of the extradition case to a final conclusion *within a reasonable time*, especially when if the accused had been tried and acquitted on the extradition charge, it would in law constitute a bar and be *res adjudicata* on an essential element in the subsequent prosecution on the subsequent charge, and thus would have preserved and maintained the rights conferred on the accused by the law

of his extradition, instead of working their destruction, as was done here, by the method or scheme of substituting a different prosecution on a different charge. In other words, is it competent for the prosecuting state to drop and discontinue the prosecution of the extradition case, and substitute in its stead the arrest and trial of the accused on another and different charge, thereby destroying or defeating the rights conferred upon him by the law of his extradition,—the supreme law of the land?

9. Can the accused be lawfully imprisoned under the warrant of extradition, after the prosecution of the charge on which he was extradited has been discontinued and abandoned in the sense that it has not been brought to trial to a final conclusion, within a reasonable time, but instead another charge on another and different indictment has been substituted and prosecuted to judgment, while the extradition case was pending?

10. Is there created and vested by force of the *treaty* pursuant to which the accused has been extradited, any jurisdiction over his person in virtue of the international warrant of extradition; and if there is, can such jurisdiction over him be held subjective and inferior to the local laws and judicial process of the prosecuting state, or is this extradition jurisdiction over the person of the accused supreme and paramount, and consequently *exclusive*, until it has wrought its function in the final termination of the extradition case and the release and discharge of the accused? Without this exclusive jurisdiction in the extradition case, how is it

possible to carry into execution the requirements of the treaty and of Section 5275 of the Revised Statutes?

11. Are the rights conferred and the obligations imposed in favor of the extradited accused by the *treaty* and by Section 5275 of the Revised Statutes of the United States, and is the due and consecutive execution of the *treaty* in carrying out the extradition by trial to a final conclusion of the charge therein specified, as the essential initial step in the enforcement of the treaty and of the statute, to be considered supreme and paramount in their operation and requirements as against all the local laws and judicial process of the prosecuting state?

12. If it is competent and permissible, as held by the state Supreme Court, to arrest and prosecute the extradited accused on a subsequent charge of committing an offense subsequently to the surrender in extradition, without first affording him an opportunity to return to the country of asylum, can this be lawfully done while the extradition case is pending and awaiting trial to a final conclusion and while the person of the accused is held in custody by virtue of the supreme authority of the international warrant of extradition, and the *jurisdiction over his person* persists in the extradition case, in full force and effect in right of its exclusive control as established by the treaty, the supreme law of the land (a question though pointedly raised, yet absolutely ignored by the state Supreme Court and the United States Circuit Court); and is this not after all a question as to which is supreme and paramount, the treaty of extradition and Section 5275 of the Re-

vised Statutes of the United States, or the local laws and judicial process of the prosecuting state?

13. Is the extradition a general and unqualified surrender and transfer of the accused to the prosecuting state without any asylum *reserved* to him against all other charges and without any restraint or restriction against doing with him whatever the prosecuting state may see fit or expedient in the application of its criminal law and to the same precise extent as fully and completely as if he had never departed from its territory, and had never acquired an asylum in another nation, and there never had been such a thing as an extradition in his case; and does the extradition cease and terminate and become absolutely *functus officio* the moment the accused is brought within the territory of the prosecuting state, leaving him to the general control of its criminal process on any subsequent charge, before he is given a trial upon the specific accusation on which he was extradited and imposing no obligation whatever requiring that he first be given a trial of the latter, but leaving it entirely at the option or election of the prosecuting state whether the accused shall be given a trial at all on the extradition charge, and whether he shall be accorded the right to return which is always dependent on the final termination of the extradition case?

14. Or is the extradition special and limited, and does it confine the authority and power of the prosecuting state in all the proceedings against the accused, to the specific charge on which he has been extradited, depriving the receiving state of all jurisdiction over his person except for the one purpose

prescribed by the *treaty* and by Section 5275 of the Revised Statutes of the United States, to wit: the trial to a final conclusion of the charge on which the extradition has been granted, thus necessitating a new extradition for an extraditable effense subsequently committed pending the trial of the charge upon which the accused had been extradited, and before the expiration of his right to return, unless he voluntarily waived this right by failing to return within the prescribed time.

15. Is it within the power of the prosecuting state to use the custody of the accused—the custody derived by virtue alone of the international warrant of extradition, for a purpose entirely different from that authorized by the *treaty* in granting his extradition, and do this by means of the scheme of discontinuing the prosecution of the extradition case and substituting for it another and different prosecution on another and different charge, to wit: on an offense alleged to have been committed subsequently to the extradition surrender, and one of such nature that had the accused been tried and acquitted on the charge upon which he was extradited it would have been *res adjudicata* and a bar to the subsequent prosecution? See *United States* v. *Butler*, 38 Fed. Rep., 499; *Coffey* v. *United States*, 116 U. S., 436, 445; *Cooper* v. *Com.*, 106 Ky., 909. These authorities establish the point that the acquittal would be *res adjudicata* of an essential element involved in and be a bar to the subsequent prosecution. By prosecuting the subsequent charge to judgment and sentence and substituting it in place of the extradition case the accused was thereby defrauded of all the

rights granted him by the *treaty* and by Section 5275 of the Revised Statutes of the United States.

16. Can the obligations imposed and the rights conferred in favor of the accused by the treaty of extradition and by Section 5275 of the Revised Statutes of the United States be nullified, frustrated, postponed or successfully evaded by the method or device of prosecuting the person extradited on another and different charge than the one specified in the extradition proceedings, *prior* to the final trial and determination of the extradition case?

17. Is the international warrant of extradition a limitation on the jurisdiction of the prosecuting state over the person of the accused, and if it is what in law are considered to be its terms and conditions?

18. When the accused is brought within the prosecuting state by virtue of the treaty of extradition, is it competent for the receiving state to drop and abandon the extradition charge, discontinue its prosecution and substitute for it and in its stead a prosecution on another charge, thus postponing and in effect destroying both the right of the accused to a trial to a final conclusion, within a reasonable time, of the extradition case, to the exclusion of every different charge, and also his right to return to the country of asylum upon his acquittal in due and consecutive course of law, of the charge on which he was extradited?

19. Is there anything in Article 3 of the convention of 1889 which authorizes the prosecuting state to defeat, frustrate or postpone the extradition jurisdiction over the accused, thus in effect making the

treaty stultify itself, by the scheme of prosecuting him on a charge of committing an extraditable offense subsequently to the extradition surrender, and do this while the extradition case is pending and awaiting trial to a final conclusion, and to its virtual extinction, or which authorizes such subsequent prosecution without the necessity of a new extradition?

20. Is it competent for the prosecuting state to imprison the accused *indefinitely* and perpetually on the warrant of extradition, without trial, and what is the effect in law of a failure to prosecute the extradition case to a final conclusion within a reasonable time? Does it terminate the extradition jurisdiction over the person of the accused and entitle him to his discharge on *habeas corpus?*

21. Does the warrant of extradition confer any authority on the sheriff to imprison the accused?

None of these questions assail the reserved rights of the states. The entire subject of international extradition has been confided by the constitution to the United States in right of its national sovereignty, and its power is necessarily supreme and exclusive. It is true, the several states are thus prevented from interposing the local criminal process in the prosecution of crime, while the extradition jurisdiction over the accused continues in full force and effect, but there is nothing unusual in this. For instance, in the case of *Neagle*, 135 U. S., 1, the State of California was prevented from trying him on an indictment for murder, even though the acts charged had been committed on its territory, because he was proceeding by authority of the laws of the United

States, the supreme law of the land, and therefore beyond the jurisdiction of the state. The principle is directly applicable to the treaty of extradition between the United States and Great Britain, and to the effect of Section 5275 of the Revised Statutes of the United States, and to the international warrant of extradition, with its exclusive authority as the sole and only permissible process in holding jurisdiction over the person of the extradited accused. He is beyond the jurisdiction of the state *on any charge or prosecution* other than the one specified in the extradition case. Jurisdiction to prosecute on another charge can be acquired, but not while the extradition case is pending, nor except on the preexistence of certain conditions and circumstances prescribed by law, which do not exist here.

The decision of both the state Supreme Court and that of the United States Circuit Court proceed primarily and fundamentally on a question quite fallacious and essentially *extra-judicial*, as to a supposed expediency rather than upon the questions of law raised by the accused. The dominating thought as disclosed in the opinion of each court is that of *expediency* in keeping the accused within the grasp of the prosecuting state on the subsequent charge, so as to prevent the possibility of his escape. One would suppose this to be a matter of police concern alone. Nor does it afford the slightest justification in law or in expediency, for taking from the accused his undoubted and paramount right to a trial of the extradition case to a final conclusion and within a reasonable time, in priority over all other charges, and prosecutions, nor permit while the extradition

case is pending, his arrest or prosecution on the subsequent charge of committing a subsequent offense. At best it could only furnish a reason or rather a cause in reason and law inadequate for depriving him of his right to return to the country of asylum on his acquittal in the extradition case. Under no view would it sanction the arrest and trial of the accused on the subsequent charge *while the extradition case is pending and he is held under the supreme and paramount jurisdiction of the international process by virtue of which alone he was brought into the territory of the prosecuting state for the one purpose of carrying out the treaty.* This point though urged with much emphasis upon both the lower courts was disposed of by purposely ignoring it. The notion of *expediency* which controlled the decision is exclusively of police and not of judicial concern. We should think there would be no difficulty in keeping the accused under police surveillance after his discharge in the extradition case, and thereafter arresting him on the subsequent charge if he failed to return to the country of asylum within the prescribed time. If he did return then he might be extradited if the case permitted. If the offense is one that is not extraditable, then the treaty prohibits the deprivation of the asylum reserved, just as in the instance of prior non-extraditable offenses. The prosecuting state must yield the demands of its local criminal law to the higher authority of the sovereignty of the extradition,—the "sovereignty of the right of asylum" as manifested in and regulated by the *treaty* and by Section 5275 of the Revised Statutes of the United States.

The courts are not allowed to substitute their notions of expediency for the requirements of the *treaty*. As well said by Mr. Justice STORY, speaking for the court in *The Isabella*, 6 Wheat., 72:

> "This court is bound to give effect to the stipulations of a treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions and requirements of the treaty or take away any qualification or integral part upon any notion of equity or general convenience or substantial justice."

All of this is very obvious, yet it escaped the attention of the lower courts, with the result that a very fallacious notion of a supposed *police expediency* controlled the decision, and in submission to it, the court placed a very forced and indefensible construction on two irrelevant and insignificant circumstances—one, the fact that in the decided cases, the principle we invoke had only been actually applied (but without any stress on that feature) to collateral prior offenses, no case having arisen where the collateral charge was of a subsequent offense; and from this it is very unreasonably deduced that the principle does not apply to the latter class of offenses, forsooth it has never as yet been so applied, the case not having arisen,—a manifestly illogical conclusion, one destructive of all principle, and a glaring *non-sequitur*, it being admitted that the case has not arisen;—the other, the fact that Article 3 of the convention of 1889 is confined in the immunity it confers, to prior offenses, and from this the very illogical inference is made that subsequent extraditable offenses may not only be prosecuted,—a proposition no one disputes, but that they may be prose-

cuted, forcing the *treaty* to stultify itself, while the preceding extradition case is pending and awaiting trial, and while the pre-existing extradition jurisdiction over the person of the accused, continues in its exclusive control and in full force and effect in right of its supremacy for the purpose of carrying out the sole and only object of the extradition, and carrying into execution the treaty of extradition, and further that such subsequent prosecution is permissible without a new extradition, and further still, that its effect is to cut off and destroy the supreme and paramount right of the accused derived from the treaty and also from Section 5275 of the Revised Statutes, to return unmolested to the country of asylum upon his acquittal of the charge on which he was extradited, and before being prosecuted on any charge different from that specified in the international warrant of extradition.

This opposing view of both the lower courts, controlling their decision contrary to these fundamental principles in the law of international extradition, surely is giving to a supposed violated subordinate and inferior law a pre-eminence in authority over the supreme law of the land, that, to say the least, is certainly revolutionary and astounding in setting up the local power and process of the state over that of the nation, in a case where the nation is vested by the Constitution with exclusive authority.

These very singular views of the state court are all conclusions utterly unreasonable and indefensible in law and in principle, and would simply make the *treaty* contradict and stultify itself, making it operate to defeat the very jurisdiction it had previ-

ously created over the person of the accused as an essential element in the pre-existing extradition. We entirely fail to perceive why a "subsequent offense" should have priority in prosecution over a pre-existing extradition and to the virtual extinction of the latter. What becomes of the *supremacy of the treaty* and of Section 5275 of the Revised Statutes of the United States?

The truth of the matter is that the third article of the convention of 1889 goes no further than any other provision that would be irrelevant to the question:—it permits by not prohibiting the prosecution of subsequent offenses in that it does not extend to them the immunity it gives against the prosecution of prior offenses. Very obviously, it would be a most irrational and ridiculous thing to embrace subsequent offenses in such an immunity clause, while undoubtedly quite proper to bring prior offenses within its scope. As to the latter class of offenses, the extradition in its character of a judicial proceeding would rightly conclude every *previous* offense not specified in the proceedings, where extraditable and of course every prior offense not extraditable, for as to the latter, the asylum secured would of necessity bar their prosecution. But in the nature of things, this could never be true of subsequent extraditable offenses in relation to the preceding extradition. And right there we want to point out that it is argued by our adversary that the prosecuting state should be allowed to proceed against the accused on the subsequent charge of committing the subsequent offense because he is within its territory and it holds jurisdiction over its territory.

The answer to this is plain and self-evident; the prosecuting state has only a limited and qualified jurisdiction over the accused and can no more prosecute him on the subsequent alleged offense than on the prior offense, simply because he may physically be within its territory. As very forcibly said by Judge JACKSON in the *Hawes* case:

> "With me," said that distinguished judge, "when there is a solemn duty staring me in the face, which would preclude a trial, although the party might be in the custody of the court, I would not disgrace my government or my country by the assumption of jurisdiction, when by such assumption the plighted faith of my government would be violated." (The plighted faith is to bring the accused to trial to a final conclusion and within a reasonable time on the extradition charge alone.) "The prisoner cannot be tried for any offense for which he was not extradited; and although he may be within the bar of the court or in a jail under the control of this court, as this court is bound to regard the treaty, it is outside of its jurisdiction to proceed with the trial as 'the supreme law of the land' otherwise provides." (Vol. 16 Albany Law Journal, 362.)

This, like the ruling in the *Rauscher* case, 119 U. S., 407, was uttered long prior to the convention of 1889, and as the latter in its third article is merely declaratory of the pre-existing law, it is of no practical operation in any event, the maxim of the law being *expressio eorum quae tacite insunt nihil operatur.* Lork Coke terms it *clausula inutilis.* (4 Rep., 73.) It needs no argument to support the very obvious proposition that the third article does not say expressly nor impliedly that the accused may be prosecuted on the subsequent charge

of committing a subsequent extraditable offense, without a new extradition, nor that such prosecution can be maintained while the pre-existing extradition case is pending and awaiting trial and while the extradition jurisdiction over the person of the accused still continues in right of its supremacy to the exclusion of all local laws and judicial process of the prosecuting state for the one purpose of carrying out the sole and only object of extradition. The *treaty* cannot be made to thus stultify itself nor to thus defeat the jurisdiction it has created for the very purpose of carrying its provisions into execution. Nor in law is it permissible to derive authority to prosecute subsequent offenses, as a result of inference or implication from the third article of the convention of 1889. (Pomeroy on Int. Law, Sec. 199; Twiss on Law of Nations, Sec. 223.) It follows that there is nothing in the third article of the convention of 1889 to justify the views of the state Supreme Court, nor to give those views the slightest support in reason, logic or law.

In the effort to subserve the assumed *expediency* which is made the basis of and the controlling consideration in the opinions of both the state Supreme Court and the United States Circuit Court it is suggested that forsooth the existing line of judicial decisions consisted of cases where the collateral prosecution was for offenses alleged to have been committed *prior* to extradition and presented no question as to subsequent offenses, that therefore, the point not being up for decision, a distinction exists between prior and subsequent offenses even though in none of the decided cases nor in the books

is there the slightest intimation or indication to countenance any such distinction, and there certainly is no rational basis for it in principle or authority; on the contrary, the reason and purpose of the law are alike most conclusively opposed to it. In no decided case is any stress placed upon the fact inherently adventitious and merely incidental that the collateral prosecution was for a prior offense.

The *treaty* cannot be arbitrarily narrowed down to a meaningless distinction. It was on the principle entirely because the collateral prosecution proceeded on the charge of a *different* offense from the one specified in the extradition process that the courts in all the cases referred to, held it in conflict with both the treaty and Section 5275 of the Revised Statutes of the United States, and prohibited because unauthorized by the treaty, and in conflict with the statute; now clearly a "subsequent offense" is just as absolutely and in every possible sense a *different* offense within the meaning and reason of the prohibition as is a prior offense. We must look to the *principle of law* which the courts applied, not to the special facts of the special case.

While undoubtedly the treaty only permits extradition for offenses committed, and therefore in that view deals alone with prior offenses, still a "subsequent offense" is an offense committed and as such, if within the treaty enumeration, is, when the accused avails himself of his right to return, properly the subject of extradition, he being in the meantime and by construction of law deemed within the territory and protection of the laws of the country of asylum for all the purposes of a criminal prose-

cution as to the subsequent charge; of that there cannot be the slightest doubt whatever. The preceding extradition could be very easily defeated and the accused be defrauded of his *treaty rights*, if it were permitted the prosecuting state to proceed against him on a charge of committing a subsequent offense, to the exclusion and subversion and practical extinction of the extradition case. It could quite readily be utilized as a scheme or pretext to fraudulently deprive the accused of the asylum reserved to him as a condition *sine qua non* of the previous extradition, vesting in him as it does the right to return to that asylum on his acquittal of the charge upon which he was extradited, and the right to procure such acquittal in the due and regular course of law.

To protect and maintain this fundamental right of asylum, the power is naturally and necessarily resident alone in the nation that granted the preceding extradition, to determine from the evidence adduced whether the accused shall be again extradited and the asylum again withdrawn, modified or abridged *pro tanto* for the special purpose of permitting his prosecution on the alleged subsequent extraditable offense. This prerogative of the sovereignty of asylum is of course supreme and exclusive. And even if there were no right of asylum reserved to the accused, still it is self-evident, the prosecuting state would be absolutely without authority to arrest and try him on the "subsequent offense" *while the charge on which he had been extradited was pending and awaiting trial and while the extradition jurisdiction over his person existed and continued in exclusive*

control, in right of its supremacy, for the paramount purpose of carrying out the sole and only object of the treaty.

These points most clearly and conclusively dispose of the suggestion replete in fallacy that the treaty deals only with offenses committed, and therefore, being thus confined to prior offenses, it does not concern itself with prosecutions for "subsequent offenses," and that consequently the prosecuting state has full power to act without the need of a new extradition and even to the exclusion and extinction of the pending extradition. The sophistry of the thing is most glaringly conspicuous; tested by its effect on the *treaty*, it is nothing short of repudiation; it is utterly subversive of the supreme law of the land.

We may perhaps be permitted to say in passing that it is manifest the attempted distinction between prior and subsequent offenses is one so flimsy that in practice it would be a very easy matter to nullify it, for the criminal law does not restrict the prosecution in the proofs to the precise date alleged in the indictment, but permits the evidence of the offense to be addressed to any previous date within the period prescribed by the statute of limitations; so that while ostensibly and on the face of the record the accused is charged with an offense alleged to have been committed at a date subsequent to the extradition surrender, yet in point of fact his conviction "as charged" may rest entirely on evidence of the offense having been committed prior to the extradition. We do not think any such facility or opportunity for fraud should be permitted. We merely

suggest the possibility as a convenient method of evading the *treaty* by a state so disposed, if once it were held that a distinction existed in the law of extradition between prior and subsequent offences, allowing the latter to be prosecuted in subversion and practically to the extinction of all the rights and obligations arising out of the extradition case. It is impossible to find any support for the attempted distinction, in reason, principle or authority. There is, it is true, a distinction to this extent:—the extradition as a judicial limitation on the right of asylum, concludes all previous extraditable offenses not embraced within its scope; and hence there can be no prosecution for a prior extraditable offense, unless the accused fails to exercise his right to return to the protection of the asylum reserved to him; but a subsequent offense could not in the nature of things be so concluded and therefore may be prosecuted; but not while the extradition case is pending, for that would be to defeat the object of the *treaty;* nor unless there is a new extradition, for otherwise the pre-existing treaty right to return, would be nullified, and the reserved asylum constructively extended to the accused by operation of law, would be destroyed, all of which the *treaty* prohibits.

Aside from the necessary and inherent distinction, to which we have referred, between the prosecution of prior and subsequent offenses, there is no difference, and there certainly is no legal, logical or rational difference between them in the application of the principle for which we are contending. If, as is self-evident, the prosecuting state can only act with-

in the circumscribed limits of the special authority delegated by the *treaty*, in the special case, surely this applies with particular force to a collateral prosecution on a subsequent charge of committing an extraditable offense subsequently to the extradition surrender, and prohibits all such arrests and prosecutions *while the extradition case is pending and awaiting trial to a final conclusion*, and afterwards, until the accused has been given a reasonable time and opportunity after his final release in the extradition case, to return to the country of asylum and has failed so to do. This decisive point is very strongly re-enforced by the consideration that the pre-existing jurisdiction over the person of the accused by virtue of the international warrant of extradition is necessarily exclusive because supreme and paramount—the *treaty* being the supreme law of the land. It is a jurisdiction specially recognized and protected in its exclusive power and authority by the provisions of Section 5275 of the Revised Statutes of the United States, enacted for the very purpose of maintaining it in all its integrity and supremacy over all the local laws and judicial proceedings of the prosecuting state. It is this controlling jurisdiction that is made by the Supreme Court of the United States the ultimate ground of the decision in the *Rauscher case*, 119 U. S., 407, where the court, in concluding a very exhaustive and learned opinion upon the general subject, say:

> "Under the views we have taken of the case the jurisdiction of the court to try such an offense" (one *different* from that on which he was extradited), "if the party himself was properly within its jurisdiction, is not denied; but

> the facts relied upon go to show that while the court did have jurisdiction to find the indictment, as well as of the questions involved in such indictment, *it did not have jurisdiction of the person at that time, so as to subject him to trial.*" (Italics ours.)

Surely this very clearly is applicable to the case of an arrest and prosecution of the accused while the extradition case is pending, on a collateral charge of committing an extraditable offense subsequently to the extradition surrender. The acquisition of the requisite jurisdiction in such a case, over the person of the accused, is legally impossible *while the extradition case is pending.* So, too, the well settled doctrine of international law that as to all charges and prosecutions other than the one specified in the pre-existing extradition proceedings, the accused is deemed to be and remain within the territory of the country of asylum, and within the protection of its laws, thus necessitating a new extradition where the alleged subsequent offense is within the treaty enumeration, unless the accused voluntarily waives his rights by failing to return, is a doctrine specially aimed at all proceedings involving the arrest and prosecution of the accused on a charge of committing an extraditable offense subsequently to his surrender, but before the expiration of his right to return. If the accused can be legally prosecuted on such subsequent charge, while the extradition case is pending, and while he is held by virtue of the international warrant of extradition for the one purpose of bringing him to trial within a reasonable time, to a final conclusion, upon the specific charge therein specified, then, clearly, both

his *treaty* right to such trial and his *treaty* right to return to the country of asylum are absolutely cut off and destroyed by the inferior and subjective authority of the subordinate laws and judicial process of the prosecuting state.

The treaty has but one object, and to which all else is subservient—the bringing of the accused to trial within a reasonable time and to a final conclusion upon the specific charge on which he was extradited. It would clearly be incompatible with the supreme obligation this necessarily imposes on the prosecuting state, for the latter to arrest and try the accused on a different charge. The integrity of the treaty must be strictly guarded and maintained. Says Wharton, in the third volume of his work on Criminal Law (7th Ed.), page 34 (quoted approvingly by Spear on Extradition (3d Ed.), page 71):

> "The sole object of extradition is to secure the presence of the fugitive in the demanding state for the purpose of trying him for a specified crime. The process is not to be used for the purpose of subjecting him collaterally to a criminal prosecution other than that specified in the demand."

Such being the sole and only object of the *treaty,* to which everything else is subordinated by the supreme law of the land, will it be seriously contended that the receiving and prosecuting state, charged with the special and paramount duty and obligation to carry out this object, can, instead, defeat or frustrate or postpone it, and prosecute the extradited accused to conviction and sentence on a different indictment, presenting an entirely different case from the one authorized by the treaty in the par-

ticular extradition? To put this question is to answer it. The prosecuting state is manifestly denied any such power of nullification. Says Mr. Justice FIELD, with the concurrence of Justices MILLER and CLIFFORD, and to which there can be no possible dissent in respect to the principle stated:

> "The case is not essentially different from a surrender of a fugitive from justice under an extradition treaty. The United States have such treaties with several European nations, and whatever may have been the extravagant doctrines respecting the rights of the states at one time in some parts of the country, it will not now be pretended that with the enforcement of such treaties any state, by her laws or judicial proceedings, can interfere."
>
> *Taylor* v. *Taintor*, 16 Wall., 377.

The prosecuting state is not vested with any power at all to disregard the treaty nor to substitute its own local criminal process in a collateral prosecution *de hors* the extradition. It is a well established principle that:

> "Whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the state; and whoever may have the right, it is to be protected."
>
> *Baker* v. *Shy*, 9 Heisk., 85.

In consonance with the sole and only purpose of the *treaty*, the extradited accused is not alone simply protected by the supremacy of the extradition jurisdiction over his person, but he is vested with the rights paramount and supreme, derived from the *treaty* itself, to a trial within a reasonable time and to a final conclusion of the specific charge on which

the extradition was granted, and when acquitted or finally released on that charge, to return to the country of asylum before he can be lawfully arrested or put to trial on any other and different extraditable offense. This is the well established law of the extradition, and it is the law of the *treaty*. It is the law that the State of California has grossly violated in the existing imprisonment of the appellant and plaintiff in error. It is not a question, as seems to be supposed by the state Supreme Court, whether the extradition was sought originally with fraudulent intent to get possession of the accused ostensibly on one charge, but really to prosecute him on another and different accusation. International law is not concerned with the presence or absence of this or that mental obliquity. It is a practical science and deals with results. The fact that the result is actually accomplished puts it on the same footing in law as if originally intended. Says Spear:

> "Whether the cheat was deliberately planned or was simply an afterthought would make no difference with the fact itself. In either event the purpose for which the delivering government, under the stipulations and obligations of a treaty, granted the custody, and which was avowed by the demanding government in making the requisition, would not be the one for which the custody would be used."
>
> Spear on Extradition (3d Ed.), page 82.

The point is, there exists a jurisdictional prohibition, a denial of power, against any user of the custody of the accused for a purpose different from his prosecution on the specific charge upon which he has

been extradited. Say the Supreme Court of the United States:

> "The general scope of the two treaties makes manifest an intention to prevent a state from obtaining jurisdiction of an individual where extradition is sought on one ground and for one expressed purpose, and then, having obtained possession of his person, to use it for another and different purpose."
>
> *Johnson* v. *Browne*, 205 U. S., 309.

It is not so much a question of fraud or of good or bad faith as it is a question of power and of jurisdiction. However, in answer to the views of the state Supreme Court, we insist that the same and greater evils and greater dangers of evasions and frauds against the *treaty* attend the collateral prosecution of "subsequent offenses" than are possible in the case of prior offenses. There are the same and greater evils and mischiefs to be guarded against, and greater danger of subterfuge, pretext and false pretense—a proposition fully established in the Brief, pages 9, 10, 30, 31, 32, 33, 148, 149, 155 and 187. The state Supreme Court does not claim that the accused has forfeited any rights conferred upon him by the supreme law of the *treaty* and by the supreme law of Section 5275 of the Revised Statutes of the United States; *and, manifestly, rights conferred by the supreme law of the land cannot be forfeited because of a violation of a subordinate and inferior law.* We quite agree with the state Supreme Court in its statement that there is no breach of international faith in compelling the accused, "in common with other persons within the jurisdiction, to assume responsibility for any offense which he may commit

after his return." But the court is clearly wrong in deducing from this its quite impossible conclusion that the arrest and prosecution on the subsequent charge can be had or maintained *while the accused is held under the supreme and exclusive authority of the international warrant of extradition for the necessarily paramount purpose of carrying out the sole and only object of the treaty.* By committing an offense, no jurisdiction attaches *ipso facto* over the person of the accused. He must be brought within the legal operation of judicial process. It is essential to arrest his person. (*People* v. *Genet*, 59 N. Y., 81.) This cannot lawfully be done while he is subject to the exclusive jurisdiction of the supreme law of his extradition. Necessarily the primary and highest obligation is to first keep perfect faith with the *treaty*, and this can only be accomplished by first complying with its requirements before intercepting and interposing with the subordinate and inferior authority of the prosecuting state in a prosecution of the accused on a charge not authorized by the extradition process, but absolutely foreign to it and entirely local and collateral. It is not permitted to thus use the custody of the accused for a purpose not authorized by the *treaty*.

The law of the extradition is the supreme law of the land. Its power and authority over the accused and the special rights it confers on him extend in full force and effect into the prosecuting state and throughout the life of the extradition case in absolute supremacy and control over all the local laws and judicial process.

The custody and jurisdiction of the supreme law

of the extradition are *sui generis* and do not merge into nor are they ever the local custody and jurisdiction of the prosecuting state. They are of the law of the nation, the manifestation of the dominant sovereignty of the United States in the national exercise of its constitutional powers, upon a subject exclusively national, and over which it has exclusive control. In the presence of the supreme law, the laws of the subordinate and inferior state are, for the time being, necessarily silent and inoperative; otherwise the supreme law would not be supreme.

III.

THE EXTRADITION TREATY AND SECTION 5275 OF THE REVISED STATUTES OF THE UNITED STATES, AS LIMITATIONS ON THE PROSECUTION OF THE ACCUSED.

We have repeatedly pointed out, and we insist, that the juridical question whether an extradited person can be arrested and brought to trial on a charge different from the one specified in the extradition proceedings is a question of *power and of jurisdiction*—not merely a question of good or bad faith. The sole and only purpose of extradition, as regulated by treaty, is to bring the accused to trial to a final conclusion on the specific charge of crime described in the proceedings. For this purpose there is established over the accused by the supreme law of the land a jurisdiction paramount and exclusive and continuing in the full supremacy of its authority and control, until the extradition case is finally disposed of and terminated, and the accused is finally released and discharged. In all extradition pursu-

ant to *treaty*, the jurisdiction and power of the prosecuting state over the accused is necessarily special in its nature, and consequently limited in its authority to prosecute him on a criminal charge. It is a power necessarily confined and restricted to the prosecution of the specific charge on which the extradition was granted. In the first place, crime is local. If the accused has sought and obtained an asylum in another country, there can be no prosecution against him while the asylum thus acquired continues to extend its protection to him. The asylum conferred is an attribute of national sovereignty and its protection is supreme and indisputable, until relinquished by the voluntary act of the nation granting it, or renounced by the accused. We are now speaking of extradition and not of kidnapping; these two essentially different things were confounded by the state Supreme Court in laboring to show, and contrary to both principle and authority, that there is no right of asylum vested in the accused when extradited pursuant to treaty,—a most untenable and indefensible proposition and proceeding upon a complete misunderstanding of the law.

Whether the asylum secured shall or shall not be relinquished in a given case is, in the nature of things, a matter entirely a exclusively for the "sovereignty of asylum" to determine. This, in modern times, is *regulated* and controlled by means of a treaty; and treaties thus made are of necessity special in their essential character, and confer only a special and limited jurisdiction over the accused, with reversion to the country of asylum, or rather to the asylum that is always reserved as a condition

sine qua non of every extradition, and against every charge or prosecution for any offense different from the one on which the accused has been extradited. These treaties are termed "Treaties of Extradition," and prescribe the cases in which and the conditions upon which extradition is granted and obtained by the nations entering into them. It is the well established doctrine that they confer legal rights and legal obligations in favor of the accused, enforceable in courts of law. The terms and conditions fixed by the *treaty*, whether express or implied, are of the very essence of the power conferred over the accused and make that power of a special, limited, defined and restricted nature, extending no further than the specific charge on which the extradition is granted. For all other purposes, and particularly for the purpose of arresting and prosecuting the accused on a subsequent charge of committing a subsequent offense, the *treaty*, by a necessary implication, denies to the prosecuting state all authority over the accused and places him by construction of law in the territory of the "sovereignty of asylum," with the exclusive right and prerogative there resident to determine as in the first and preceding extradition, from such evidence as may be adduced, whether the asylum shall again be withdrawn, and whether the accused shall be surrendered for trial and prosecution on the different charge of committing subsequently, but before the expiration of his right to return to the country of asylum, another extraditable offense. This power in the sovereignty of asylum is indispensable to the protection and maintenance of the asylum it has in right of its

sovereignty *reserved* to the accused as a condition *sine qua non* of his previous extradition. Now, clearly, the sole and only function of a treaty of extradition is to restrict, abridge and regulate the "sovereign right of asylum" in the special case by transferring the accused to the territory of the prosecuting state, not absolutely, but for the one, sole and special purpose of bringing him to trial to a final conclusion on the specific charge upon which he is extradited and on none other; with the condition annexed that *upon his acquittal of that charge* he be given a reasonable time and opportunity to return, without detention or molestation, to the protection of the nation from whose asylum he had been forcibly taken, by authority of the *treaty*, for the special and defined purpose we have stated. By manifest implication of law, a trial upon any charge other and different than that specified in the extradition proceedings is as strongly prohibited as if in terms express and positive the treaty required that the accused be tried to a final conclusion on the specific charge upon which his extradition is granted and provided, further, that he shall not be arrested or brought to trial upon any other or different charge whatever, except, if at all, upon a new extradition, or unless he voluntarily relinquished his rights. *According to a very elementary doctrine of American and English jurisprudence, where a special as distinguished from a general authority is conferred by law over a person or thing, it is a denial of all other and more extensive power and authority over that person or thing.* It is this principle (the treaty being the source and measure of

the derivative and delegated authority over the person of the accused) which restricts the scope of the prosecution and the power of the prosecuting state over the accused, to the special purpose of his trial upon the specific charge on which his extradition was granted, and makes it a condition *sine qua non* of his extradition that as to any other or subsequent charge he cannot be arrested or prosecuted until the consent of the sovereignty of asylum is first obtained as an essential prerequisite to the exercise of the necessary jurisdiction over his person on the subsequent charge. This consent is to be procured only on the terms and conditions and in the cases specified in the treaty of extradition. So it is, we insist, that the power of the prosecuting state over the accused, when he is removed to its territory on extradition pursuant to the *treaty*, is circumscribed and necessarily special, limited and restricted to the specific charge on which he was extradited, and cannot lawfully extend to any other accusation—*certainly not while the extradition case is pending and awaiting trial.* It is a power conferred by the supreme law of the land, for a special purpose and the jurisdiction over the accused cannot go beyond it. The extradition is not, as most erroneously assumed by the lower courts, a general and absolute surrender of the accused to the prosecuting state, or a mere transfer of his person from the territory of one state to that of another, with the same absolute jurisdiction in the latter that belongs to it of right over all persons inhabitants of its territory. It is inherently and necessarily a special and limited transfer for a special and limited purpose, imposing on the prosecuting state the duty and ob

ligation, imperative and paramount, to confine its action and proceedings against the accused to the one specific case that was made the basis and object of his extradition. We repeat with increased emphasis that any further or different prosecution against him on a further and different extraditable charge, of an offense alleged to have been subsequently committed, prior to the expiration of his right to return to the country from which he had been forcibly taken on the preceding extradition, is only possible by consent of the sovereignty of asylum and by special authority of the *treaty* and upon the terms and conditions there prescribed, both expressly and impliedly. This can only be available after the previous extradition case is finally terminated, and the accused has returned within the required time to the protection of the laws of the country of asylum. If he fails to so return (and, of course, he must be first afforded the opportunity), he relinquishes his rights and also the asylum guaranteed him by the law of his extradition, and can then be legally prosecuted on any charge, prior or subsequent, extraditable or not. *The central controlling point is that in extradition by treaty the treaty is both the exclusive source and the exclusive measure of the power and authority of the prosecuting state over the accused in the matter of his prosecution on a criminal charge.* This rests on the broad ground of the necessity of protecting the reserved asylum, not on the narrow and special theory that the extradition only concludes what precedes it, in the nature of offenses, a theory to which there can be no objection when rightly understood and rightly restricted to its special signification.

All these various propositions are very thoroughly established in the law of international extradition and are quite fundamental. They obviously apply with especial force, as in reason they must, to prosecutions of the accused on charges of offenses alleged to have been committed subsequently to the extradition surrender, but prior to the expiration of his right to return to the country of asylum and to the protection of its laws; and are strongly prohibitive of all such prosecutions while the extradition case is pending and awaiting trial to a final conclusion. They are propositions primarily and logically predicated on the pre-existence and supremacy of the right of asylum, and on the pre-existence and supremacy of a *treaty* confirming and regulating the right by prescribing the cases in which and the terms and conditions upon which the right of asylum enjoyed by and vested in the accused is legally relinquished or abridged temporarily, and only temporarily, so as to permit and render possible his prosecution and punishment by another state for an offense alleged to have been committed against its laws, and being one of those specified in the treaty enumeration. The propositions for which we are contending are limited to extradition pursuant to *treaty*. Of course, the treaty covers only offenses actually, and therefore previously, committed, but this comprises extraditable offenses committed after the surrender in extradition and prior to the expiration of the right of the accused to return to the country of asylum; as to the prosecution of that class of offenses, the well settled principle of international law is that for all pur-

poses of arrest and criminal prosecution the accused is deemed to be physically within the territory of the country of asylum, just as fully and completely as if he had been acquitted on the extradition charge and had returned in due time to the asylum from which he had been forcibly taken on the preceding extradition, but subject, of course, to his actually returning within the required time.

Hence it is necessary to again extradite him pursuant to the *treaty* before he can be arrested and prosecuted on the subsequent charge. This well settled doctrine in the law of international jurisdiction has received an extended discussion both in the Brief and in other parts of this argument, and, therefore, we will only say at this time *that the doctrine is absolutely necessary in order to protect the asylum reserved to the accused as a condition sine qua non of his extradition*, against fraudulent or unlawful evasion and violation, and against false prosecutions on unfounded and groundless subsequent charges of subsequent offenses, perhaps specially designed merely to cut off the right of asylum and the right of the accused to return to the country of asylum in the event of his acquittal of the charge specified in the extradition; and is necessary to protect the right of asylum against all such prosecutions where they are merely a fraudulent pretext or subterfuge and have no evidence to sustain them, as was the case with the subsequent prosecution of the appellant and plaintiff in error on the indictment of December 29, 1905. To provide against all possible interference with the reserved right of asylum, such as stated, the law absolutely prohibits any and all arrest and pros-

ecution of the accused on a charge of committing a subsequent extraditable offense, until he is first given a reasonable time and opportunity to return to the country of asylum after his final release in the extradition case. If he does return within the required time, then a new extradition on the subsequent charge is an essential prerequisite to his arrest and prosecution. *The treaty clearly covers the case.*

The treaty cannot be given such an extremely narrow and unreasonable construction as to confine its operation to offenses committed previously to a given extradition; pursuing this to its logical conclusion, it would follow that if a subsequent extraditable offense was committed and the offender then returned to the country of previous asylum, he could not be extradited, which is preposterous. The *treaty* in its essential nature extends wherever the asylum extends; and this is true whether the asylum is actual or constructive in its application to a given case. *And even if, for the sake of argument, it were conceded that no asylum, not even constructively, extended in any case to the accused on a charge of committing a "subsequent offense," still this would not permit his arrest or prosecution while the preceding extradition case was pending and awaiting trial to a final conclusion, and while the extradition jurisdiction over his person existed and persisted in its exclusive control by right of its supremacy for the purpose of carrying out the sole and only object of the treaty and of the extradition*—a proposition very fully presented in the Brief and in other parts of this argument, and therefore not requiring any further

discussion at this time. The principle invoked in this respect by us is so very elementary in the law of jurisdiction that it can properly be said to be axiomatic. So, too, is the doctrine that the judgment and proceedings of a judicial tribunal, where there is either a want of jurisdiction over the person or subject-matter, are null and void in the absolute sense.

In the Brief, pages 23 to 202, all the various points we present in this argument will be found fully discussed and the authorities fully sustaining them, not only cited, but quoted at length. It will, therefore, suffice at this time to simply cite some of these authorities, referring generally to the Brief for the appropriate excerpts:

4 Lawrence's Wheaton Les Elements Du Droit International, pp. 368, 371, 503, 507.

14 Albany Law Journal, pp. 85, 88, 90, 93, 96.

16 Albany Law Journal, p. 363.

Heffter Droit International par Geffcken, pp. 145, 150.

Billot Traite de L'Extradition, pp. 308, 313.

2 Bernard Traite de L'Extradition, pp. 483, 493, 510, 516, 670.

2 Moore on Extradition, p. 1042.

Spear on Extradition, p. 205 (3d Ed.).

2 Andrews' American Law (1908), § 910.

Twiss on Law of Nations, § 223.

Hawley on International Extradition, pp. 8, 12.

2 Wharton's Digest International Law, p. 798.

Pomeroy on International Law, § 199.

1 Oppenheim on International Law, § 332.

Foreign Rel. U. S., 1876, pp. 227, 259, 278, 279, 289.

Foreign Rel. U. S., 1895, p. 492.

The Isabella, 6 Wheat., 72.

United States v. *Rauscher*, 119 U. S., 407.

Johnson v. *Browne*, 205 U. S., 309.

Cosgrove v. *Winney*, 174 U. S., 64, 68, 69.

Taylor v. *Taintor*, 16 Wall., 370.

People v. *Stout*, 81 Hun, 341.

United States v. *Watts*, 8 Sawy., 370.

Ex parte Hibbs, 26 Fed. Rep., 431.

Ex parte Baruch, 41 Fed. Rep., 472.

Bachrach v. *Lagrave*, 1 Hun, 689, 692 to 695.

State v. *Vanderpool*, 39 Ohio St., 278.

Com. v. *Hawes*, 13 Bush., 707.

Blandford v. *State*, 10 Tex. App., 638, 639.

Ex parte Begerow, 133 Cal., 349.

Having in support of our position fully presented the fundamental principles of all treaties of extradition, and particularly of the treaty of extradition between the United States and Great Britain, it only remains to point out that Congress, in enacting Section 5275 of the Revised Statutes of the United States, did so for the very purpose of maintaining these fundamental principles of the law of international extradition, and especially to protect the rights they secure to the accused—the very rights we have set up in support of our claims. In the Brief, pages 177 to 202, will also be found an extended discussion of the statute and pertinent citations of the authorities. We respectfuly refer to what is there presented, feeling confident it establishes the

correctness of our position, upon both principle and authority.

It is quite evident from the terms of the statute that the extradition custody and the extradition jurisdiction over the accused are to continue supreme and inviolate (to quote the very language of the statute), "until the conclusion of his trial for the crimes or offenses specified in the warrant of extradition, *and* until his final discharge from custody or imprisonment, for or on account of such crimes or offenses."

This in and of itself excludes every collateral arrest and prosecution of the accused *while the extradition case is pending,* on any and every charge of committing a "subsequent extraditable offense." One would think this too clear for discussion. The plain meaning of the statute is, that only on the extradition charge, and on that alone, shall the accused be held in custody; and it prohibits by a necessary implication the arrest or custody of the accused on any other and different charge, including, of course, the charge of committing a "subsequent offense."

The protection of the statute could not constitutionally extend to the accused on a charge in a state court, upon which there had been no extradition. Hence of necessity, the statute implies that the custody be confined to the specific charge on which the extradition is granted. The statute is the supreme law of the land.

The obvious import of the statute is that pending the extradition case and its trial to a final conclusion, no other power, authority or jurisdiction shall intervene, or interfere with the legal, consecutive

and regular course of judicial proceedings in the prosecution of the charge specified in the extradition process. The statute manifestly requires that the custody of the accused be used exclusively for the one purpose of his prosecution on the extradition charge, and prohibits its use for any other purpose or for the purpose of any other prosecution. *There can be but one custody and but one jurisdiction over the person of the accused; and that custody and that jurisdiction, the custody and jurisdiction of the extradition. This clearly is the meaning of the statute, or it means nothing. It is the supreme law of the land, and therefore excludes every law and judicial process of the several states, requisite to the prosecution of the accused on a subsequent charge while the extradition case is pending and awaiting trial to a final conclusion.*

We have not been able to obtain a copy of the Brief of the appellees and defendants in error, though we served upon their counsel, November 11, 1908, a copy of our printed Brief; we therefore are not in a position to apply our argument with special reference to the contents of our adversary's Brief, but there is on file a paper signed by counsel in which he very extravagantly undertakes to inform the court that all the questions we raise are really not involved, and that "the real matter to be determined by this court in these causes is whether or not, under the treaty with Great Britain (which by its terms deals only with *prior offenses*), a person who has been extradited from Canada for an extraditable offense can be tried, convicted and sentenced for another extraditable offense committed by him

in California subsequent to his extradition, and before a final determination of the case upon which he was so extradited."

In this the counsel ignores entirely Section 5275 of the Revised Statutes of the United States, just as did the state Supreme Court in its ruling that the statute does not apply. He also, like the state Supreme Court, ignores the important fact that the subsequent collateral arrest and prosecution of the accused were had and maintained *while the extradition case was pending and awaiting trial to a final conclusion and while the extradition jurisdiction over the person of the accused existed and persisted in its exclusive control in right of its supremacy, for the purpose of executing the treaty and carrying into effect the sole and only object of the extradition.* The counsel also ignores the fact that the treaty while of necessity dealing only with prior offenses in that the offense must first be committed, yet it extends wherever the asylum extends and by construction of law and as a condition *sine qua non* of every extradition, the accused is deemed to be physically within the territory of the "sovereignty of asylum" and entitled to the protection of its laws and of its asylum as against every charge and every prosecution for any offense claimed to have been committed subsequently, but before the expiration of his right to return to the asylum reserved for him, thus necessitating a new extradition pursuant to the *treaty* as an essential pre-requisite to his arrest and prosecution on any subsequent extraditable offense, unless he relinquishes the asylum reserved for him by voluntarily failing to return

within the prescribed time. The counsel also ignores the point, as did the state Supreme Court that even if it were the case that the accused could be arrested and prosecuted on the subsequent charge, without a new extradition and without first affording him an opportunity to return to the country of asylum, that still it could not legally be done while the extradition charge was pending and awaiting trial to a final conclusion and while the extradition jurisdiction over the person of the accused existed and persisted in its exclusive control in right of its supremacy, for the purpose of executing the *treaty* and carrying into effect the sole and only object of the extradition.

Every one of the *twenty-one* questions we have stated at page 16 and following of this argument arises quite properly on the record in both cases, the counsel for the appellees and defendants in error to the contrary notwithstanding.

We have already pointed out that the Supreme Court of the United States in the *Rauscher case* ultimately and quite rightly rested the decision upon the conclusive ground of want of jurisdiction over the person of the accused, and said:

> "Under the views we have taken of the case the jurisdiction of the court to try such an offense" (one *different* from that on which he was extradited) "if the party himself was properly within its jurisdiction, is not denied; but the facts relied upon go to show that while the court did have jurisdiction to find the indictment, as well as of the questions involved in such indictment, it did not have jurisdiction of the person at that time, so as to subject him to trial."

That is to say, the court possessed no jurisdiction over the person of the accused, to prosecute him or try him on the collateral charge, while the extradition case was pending and awaiting trial to a final conclusion and while the extradition jurisdiction over his person, existed and persisted in its exclusive control in right of its supremacy, for the one purpose of executing the treaty and carrying into effect the sole and only object of the extradition. And the court, after reviewing the authorities, declared it to be the *principle* that the accused could only be tried for the offense specified in the extradition proceedings, and for none other, until he had first been given a reasonable time and opportunity after his final release or trial on that charge, to return to the country from whose *asylum* he had been forcibly taken under those proceedings. Throughout its opinion, the court reasoned that the *treaty* was the source and measure of the jurisdiction over the person of the accused; that his extradition was necessarily of a special and limited nature and for a special and limited purpose; that beyond this all power was denied the prosecuting State to arrest or try the accused on a criminal charge, until at least he had been first given a reasonable time and opportunity after his acquittal or final release in the extradition case, to return to the country of asylum and failed so to do. The court was emphatic that the asylum secured was modified and abridged only temporarily and to the special and limited extent of the particular extradition, and continued for all other purposes of dealing with the accused on a criminal prosecution, as fully as if after committing another offense, he had actually

and physically returned to the country "from whose asylum he had been forcibly taken." This is unquestionably or at least indisputably the law, and results from the fundamental doctrine that the *treaty* is the source and measure of the jurisdiction over the person of the accused, for all purposes of a criminal charge, and is in its very nature simply a regulation and special limitation of the "sovereign right of asylum" modifying it only temporarily restricting its abridgement to the charge specified in the extradition, reserving and preserving it against any and every prosecution on another and different charge, except upon a new extradition, until the accused voluntarily relinquishes it by failing to return within the required time. The extradition is never a general abandonment or absolute release of the asylum secured. Say the court in the *Rauscher case:*

> "If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one severeignty to another, the argument" (of general abandonment of asylum) "might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted the extradition. No such view of the solemn public treaties between the great nations of the earth can be sustained by a

tribunal called upon to give judicial construction to them."

This is simply the declaration of the principle that the treaty is the source and measure of the only permissible jurisdiction over the person of the accused for the purposes of a criminal prosecution against him. Says Spear:

> "It is to be remembered that each government assumes, as its starting point, in making an extradition treaty, that every person within its jurisdiction, and not violating its laws, is entitled, as against all the world, to the *prima facie* right of undisturbed and protected asylum. Now, neither government agrees to a withdrawal of this right in respect to any accused party, and neither agrees to place that party in the custody of the other, except upon specified conditions distinctly stated in the treaty, and for a purpose as distinctly stated in the proceedings required by the treaty; and hence it is simply monstrous to assume that these conditions and this purpose are operative only for securing the surrender, and absolutely of no effect the moment the surrender has been actually obtained."
>
> Spear on Extradition (3rd Ed.), page 205.

It is true that in the *Rauscher case*, the court refers to the collateral prosecution as being one for an offense previous to the extradition, but no stress is placed on that incidental fact, nor is the slightest significance ascribed to it; and it is evident the court in referring to it, was doing no more than applying the general principle controlling and prohibiting all collateral prosecutions whether of prior or subsequent offenses, to the concrete facts of the special case. There is nowhere the slightest indication that

the court intended to curtail, restrict or revolutionize the general principle by confining it to collateral prosecutions for "prior offenses." In formally declaring the principle the court placed no such a qualification upon it; and as justly pointed out by Professor Moore (1 Moore on Extradition, Sec. 174), it is this general statement of the principle which must be taken as the correct declaration of the law, rather than the remarks pertaining merely to the application of the principle to the special facts of the case. *No principle of the law is to be curtailed nor limited by the special facts of the case to which it applies in common with others having different incidental features.* It would be contrary to all the authorities and to the reason and purpose of the law to restrict the scope of the principle to "prior offenses." The principle in its reasons and in the necessity upon which it proceeds is applicable to all collateral criminal prosecutions, whether the offense be prior or subsequent, and this because of the decisive fact *that they are not within the special authority of the particular extradition, and hence are in derogation of and in conflict with its purpose as defined and limited by the treaty.* Accordingly, the Supreme Court of the United States, clearly states the controlling principle without restriction or qualification as to prior offenses, in the following explicit terms:

> "Upon a review of these decisions of the federal and state courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person who has been

> brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." (*United States* v. *Rauscher,* 119 U. S., 407.)

Surely if the law restricted this principle to "prior offenses" in the sense used by our adversary, and the state judiciary, the Supreme Court of the United States would have placed this qualification in its carefully worded statement of the doctrine, and not made it, as it is, sufficiently comprehensive to include every offense *different* from that specified in the extradition proceedings. Certainly Section 5275 of the Revised Statutes of the United States takes no distinction between prior and subsequent collateral offenses, and this in itself should be and is decisive. *The statute plainly makes the pendency of the extradition case, the controlling fact,* and on that basis alone, excludes every different custody of the accused "until the conclusion of his trial, for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment, for or on account of such crimes or offenses, and for a reasonable time thereafter." *These are the words of the statute;* they leave no room for doubt; and no room for engrafting upon them an absurd and nonsensical distinction between prior and subsequent offenses, or between a charge and prosecution for the one or the other.

We have heard it argued that Section 5275 of the Revised Statutes of the United States has ceased to be the law in that by implication, it has been repealed by the third article of the Convention of 1889. Aside from the great disfavor with which the law looks upon repeals by implication, it is manifest that in this instance there is no such repeal. In the first place the third article of the Convention of 1889, is merely declaratory of the pre-existing law and therefore adds nothing to the rule of decision. The maxim is *Expressio eorum quae tacite insunt nihil operatur.* Or, as Lord Coke says: "The expression of a clause which the law implies works nothing." It is, he says, *clausula inutilis* (4 Rep., 73.) That the third article of the Convention of 1889 is merely declaratory of the pre-existing law, is clearly established by the preceding ruling in *United States* v. *Rauscher*, 119 U. S., 407. In the next place, the third article of the Convention of 1889 does not cover the same ground over which Section 5275 of the Revised Statutes of the United States extends its operation. And in the third place, upon the principles asserted by the court in *Johnson* v. *Browne*, 205 U. S., 309, where the question was considered and decided, the statute has not been repealed by the Convention of 1889. If the third article of the Convention of 1889 had made express provision that the accused could be brought to trial on a subsequent offense, and prosecuted and sentenced while the preceding extradition case was pending and awaiting trial to a final conclusion (thus making the *treaty* stultify itself and defeat the very jurisdiction it had created over the person of the ac-

cused in the pre-existing extradition case), and further that such collateral prosecution if on a subsequent but extraditable offense, could also be maintained without the necessity of a new extradition, then perhaps there would be a repeal by implication, of the statute; but surely not until then. The Supreme Court of the United States in the *Rauscher case*, construed Section 5275 of the Revised Statutes as in effect providing that the accused "shall not be arrested or tried for any other offense than that with which he was charged in the proceedings, until he shall have had a reasonable time to return *unmolested* to the country from which he was brought." And Mr. Justice Gray in a specially concurring opinion resting alone on this statute, held it to mean "that the accused shall be tried only for the crime specified in the warrant of extradition, and shall be allowed a reasonable time to depart out of the United States, *before he can be arrested or detained for another offense.*" (Italics ours.) In a case decided since the Convention of 1889 went into effect, the court held explicitly that it in no way affected the operation and scope of the statute. Say the court:

> "In addition to the provisions of the treaty of 1889, we find still in existence the already mentioned sections (5272 and 5275) of the Revised Statutes, which prohibit a person's arrest or trial for any other offense than that with which he was charged in the extradition proceedings, until he shall have had a reasonable time to return *unmolested* to the country from which he was brought. * * * These sections are not incompatible with the treaty or in any way inconsistent therewith. We find

> nothing in the treaty which provides that a person shall be surrendered for one offense and then that he may be punished (or prosecuted) for another."

This was said with special reference to the Convention of 1889.

Johnson v. *Browne*, 205 U. S., 309.

The meaning of the statute is quite fully discussed by Spear in his work on Extradition, third edition, pages 126, 232 and 233; his views fully sustain our contention. Appropriate excerpts will be found at pages 188, 189 and 190 of the Brief. He also points out that the extradition jurisdiction over the accused is *sui generis* and not at all the jurisdiction of the prosecuting state, such as it possesses in the ordinary administration of its criminal law. Speaking of Section 5275 of the Revised Statutes he says:

> "No such provision would have been made if the whole case, after delivery, were simply one of municipal law, and had no relation to a custody granted by a foreign government under a treaty, and involved no obligation in respect to the use thereof. The theory of the legislation is that the United States, in obtaining the extradition of a fugitive criminal, acquires no more power over his person than that which results from the treaty."

Spear on Extradition, page 233.

The latter proposition to the effect that the power of the prosecuting state over the accused is derivative and special is decisive of the question. In a case in New York the court place a similar construction on Section 5275 of the Revised Statutes, and say:

> "Before the supplemental treaty of 1889 was made, that of 1842 was in many cases so construed as not to permit the trial of a person delivered up in execution of the treaty, for any offense other than that for which he was extradited, while his custody, taken by such surrender, continued. And such is the import of the federal statute on the subject."
>
> *People* v. *Stout*, 81 Hun., 339.

This, too, is the view accepted by the Supreme Court of the United States:

> "The general scope of the two treaties," say the court, "makes manifest an intention to prevent a state from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then, having obtained possession of his person, to use it for another and different purpose."
>
> *Johnson* v. *Browne*, 205 U. S., 309.

All these doctrines rest ultimately upon the principle that the *treaty* is the exclusive source and measure of the power of the prosecuting state over the accused, for all purposes of a criminal prosecution; that the extradition is special and for a special and limited purpose, precisely defined and previously ascertained, and that as to any and every charge or prosecution different from the one authorized by the extradition, the accused is by construction of law deemed physically to be within the territory of the country of asylum and therefore beyond the power of the prosecuting state to subject him to arrest or trial on the collateral charge, except upon a new extradition or voluntary waiver of his rights. A leading and very distinguished authority on the law of extradition, after stating in the

most positive and unqualified terms the general principle

> "that an extradited person cannot be tried for anything else but the infraction for which his extradition has been granted. It is incontestable that the tribunals can try the accused only on the facts for which the extradition has been accorded. This rule is an immediate corollary from the principle which imposes on the judiciary an obligation to apply the treaties of extradition,—a principle which itself is a direct consequence of the higher principle of the separation of powers. The rule and principle belong to the very organization of political societies and must have precedence over every internal law. It is, besides, a condition *sine qua non* of the very principle of extradition,"

says with great precision:

> "The engagements taken by a government not to permit the extradited to be tried on any charge but the one on which his extradition was granted must be interpreted in this sense—that he shall be considered absent respecting all prosecutions not covered by the extradition."
>
> *Billot Traite de L' Extradition*, pages 308 and 313.

To the same effect, see:

Heffter Du Droit International par Geffcken, page 150.

Foreign Rel. U. S., 1876, pages 227, 259, 279.

2 Moore on Extradition, page 1042.

16 Albany Law Journal, page 363.

Mr. Lawrence says:

> "When the extradition of an individual is granted by one nation to another, the protection of the foreign asylum to the accused party

> is only impaired to the extent expressed in the warrant, and that, for the cases not excepted or provided for in the convention, and for all other purposes, the person surrendered is to be deemed still legally in the country from which he was extradited; or, as stated in a recent treatise on extradition, 'the fiction according to which, for every fact foreign to the extradition, he is still in the territory of the country of refuge, must be completely respected; and if an offense is brought to notice in the course of the proceedings the results must be the same.' (*Vazelhas Etudes d' Extradition*, page 155.)"
>
> 16 Albany Law Journal, page 363.

This statement of the law, directly applies to the second charge of perjury, or it is meaningless.

Professor Moore after stating that the asylum is abridged by extradition, only to the special extent of the specific charge on which it is granted, says:

> "As to other offenses, he is to be considered as being still within the state from which he was taken, and as being entitled to return to that state before being tried for any such offense."

This is manifestly in point.

> 2 Moore on Extradition, page 1042.

If the "subsequent offense" is extraditable, he cannot be arrested or put to trial without a new extradition. The following is decisive:

> "If after the extradition is obtained, a *new* crime is discovered, a *new* demand of extradition must be made and accorded before the person can be prosecuted or punished for the *new* crime."
>
> 4 Lawrence's Com. sur. Wheaton, page 507.

2 Bernard Traité de L'Extradition, page 516.

Foreign Rel. U. S., 1876, page 278, 287.

The principle for which we are contending is the necessary result of the fundamental doctrine of inviolability of asylum. Thus, Bernard states the law in the following terms:

> "The extradited person must not be tried on any charge but the one for the infraction which constitutes the object of the extradition. This principle is founded on the right of sovereignty of the country of asylum." (2 Bernard Traité de L'Extradition, page 483. See, also pages 493, 510, 670.)

Heffter Droit International, par Geffeken, page 150, is to the same effect.

All such elucidating explanation of the principle presents forcibly the reason of the law, and serves to make emphatic and more pointedly significant the exemption of the person of the accused from all arrest on charges and prosecutions not authorized by the specific extradition. As to all such charges and prosecutions there must be a new extradition if the offense be extraditable, unless the accused has voluntarily relinquished the protection of the asylum reserved to him, by failing to return within the time required. Such subsequent offenses are well within the *treaty* and necessarily will precede the extradition authorizing their prosecution. As already pointed out, the *treaty* is always co-extensive with the scope of the asylum, actual and constructive, limited only by the offenses enumerated, and the terms and conditions upon which, by its authority, the extradition is granted. The *treaty* is primarily concerned with

the "sovereign right of asylum," not at all with the entirely irrelevant question as to whether the offense for which the extradition is legally granted is a subsequent offense, as related to a specific preceding extradition. In this special sense all offenses for which extradition is permitted are prior offenses, as they all must precede the particular extradition embracing them. This is literally true of "subsequent extraditable offenses," for which a new extradition is requisite before the accused can be arrested or prosecuted. The treaty is always applicable to *such* offenses, where the reserved right of asylum is constructively and by operation of law, extended to the accused.

The one special purpose of the doctrine placing the extradited accused by construction of law in the country of asylum as to all charges, arrests and prosecutions for offenses not within the particular extradition, is to prevent his arrest and prosecution on a subsequent charge of subsequent offense, while the extradition case is pending and awaiting trial. The necessity for this is the necessity for protecting and maintaining both the extradition jurisdiction over the accused and the asylum reserved to him as a condition *sine qua non* of his extradition.

These suggestions are made in answer to the contention of our opponents that as the *treaty* "by its terms deals only with prior offenses," it cannot extend to subsequent extraditable offenses. If this were the case, the offender could not be extradited if perchance he returned to the country of asylum after committing the subsequent offense. The absurdity of a contention that leads to such a result

is manifest. *Then, too, beyond this, the point remains, that even if it were true that the treaty does not extend to "subsequent offenses," and that, therefore, the accused may be arrested and prosecuted without first obtaining a new extradition, this clearly cannot be done while the extradition case is pending and awaiting trial to a final conclusion and while the extradition jurisdiction over the person of the accused exists and persists in its exclusive control by virtue of the supreme law of the land, and for the one purpose of carrying out the sole and only object of the extradition, as required by the treaty, his trial to a final conclusion and within a reasonable time, on the charge upon which he has been extradited.* This is the plain legal effect of both the treaty and Section 5275 of the Revised Statutes. A trial on any other charge would necessarily be in conflict with the obligation imposed by the supreme law, and manifestly be an invasion of the extradition jurisdiction over the person of the accused.

The local laws and judicial process of the subordinate state, cannot be made to prevail over the supreme law of the land.

As to the requirement of a new extradition as a pre-requisite to the prosecution of the accused on the subsequent charge of committing a subsequent extraditable offense, we want to say in conclusion that the necessity for it is manifest. There is the reserved right of asylum to be protected against interference or impairment by means of unfounded and fraudulent prosecutions on subsequent charges; the power to extend the needed protection is quite

properly lodged *exclusively* in the sovereignty whose asylum the accused has been guaranteed as a condition *sine qua non* of his extradition. The exercise of the power in a given case is regulated by the *treaty* governing extraditions, which in principle, as we have seen, is the source and measure of the requisite authority to subject the accused to arrest and trial on a criminal charge.

IV.

LIMITATION AS TO TIME WITHIN WHICH EXTRADITION CASE MUST BE PROSECUTED.

It is submitted we have established to a demonstration that upon both principle and authority, the arrest, trial, judgment and sentence of the appellant and plaintiff in error, on the second charge of perjury, and on its indictment of December 29, 1905, are in glaring violation of the Treaty of Extradition between the United States and Great Britain, and of Section 5275 of the Revised Statutes of the United States, of international law, and of Section one of the Fourteenth Amendment and Article 6 of the Constitution. It results that the imprisonment, so far as it exists, by virtue of the void proceedings on the second indictment, is unlawful, and *habeas corpus* is the appropriate remedy. The only other question arising is as to the validity of the imprisonment under the warrant of extradition. We insist that the imprisonment in that behalf is also unlawful, and also in violation of the *treaty* and of Section 5275 of the Revised Statutes of the United States, and of international law, and of the Consti-

tution. We contend that by the law of international extradition, the extradited accused must be brought to trial to a final conclusion, on the charge specified in the proceedings, *within a reasonable time*. We insist that this in law places a necessary limitation on the life of the warrant of extradition, for otherwise it would authorize the perpetual imprisonment of the accused, without a trial. What constitutes a "reasonable time," is a question of law that will ordinarily be determined by analogy to the *lex fori*, in this case the law of the State of California, which prescribes a limitation of sixty days after the disagreement of the jury, and this occurred on December 22, 1905; there has been no trial of the extradition case since then, nor any effort made in that direction by the prosecution, although the accused has at all times insisted on trial and objected to all postponements; trial has been absolutely and arbitrarily refused by the State Court. It is now more than *three years* since the jury disagreed, and the accused is still being imprisoned without trial, on the extradition charge. In the opening statement of this argument, we have presented all the essential facts on the point, with the pertinent references to the record, and we at this time simply urge what is there stated. It is manifest from the facts disclosed by the record, that the case has been abandoned and its prosecution discontinued. This resulted from the action of the state authorities in substituting the prosecution of the second accusation in the place of the extradition case.

It is of the very essence of the protection extended

to the accused by the law of the extradition that he be given a trial to a final conclusion within a reasonable time. Without this requirement, all the rights conferred upon him by the *treaty* and by Section 5275 of the Revised Statutes of the United States, would be absolutely worthless. The law of the extradition does not in terms define what constitutes a reasonable time, except to require that the extradition charges be prosecuted with due diligence, to a final conclusion, with the right vested in the accused, to his discharge from imprisonment, if his prosecution be unreasonably delayed. (Hawley on International Extradition, page 12.) Much must be left to the law of the tribunal having authority to hold trial of the charge.

This question as to the limitation of "reasonable time" and the question as to the right of an accused person to his discharge on *habeas corpus*, where the limit has been exceeded, were very fully and learnedly discussed and considered by the Supreme Court of California in *Ex Parte Begerow*, 133 Cal., 349, and the conclusion reached that it was a violation of the law to imprison the accused without trial, for more than sixty days after the disagreement of the jury, and that he was entitled to his discharge on *habeas corpus*. It was a case where the prisoner was charged with murder. The court held that it was not only contrary to the statute and the constitution, but also contrary to Magna Charta, and not "due process of law" to imprison the accused without trial, an unreasonable length of time.

We insist that it is a necessary implication of the

treaty and of Section 5275 of the Revised Statutes of the United States that the extradited accused be brought to trial to a final conclusion of the case, within a *reasonable time*, or be discharged from imprisonment. The duty to prosecute is imposed on the state authorities, not on the accused; and if there is good cause for an apparently unreasonable delay, it is incumbent on the prosecuting state to establish it affirmatively on the face of the record. So held in *Ex Parte Begerow*, 133 Cal., 349. There was no good cause for the exceedingly monstrous delay in our case, and none was attempted to be shown. The point has already been sufficiently discussed in the brief, page 35, and following. Also page 91.

The fact that the second charge and its indictment of December 29, 1905, were brought to trial within sixty days after the disagreement of the jury in the extradition case, is conclusive that the latter could have been brought to trial within that period of time. The record shows affirmatively that the extradition case could have been brought to trial in January or February, March or April, 1906, or at any time thereafter. Since then, many times sixty days have elapsed without trial. We respectfully refer to the facts set forth on this point, in the opening statement of this argument; they fully sustain our contention. *It is ridiculous to say that the law permits the perpetual imprisonment of the accused; and it is equally ridiculous to maintain that imprisonment without trial for three years and more is not unlawful.* It follows that by reason of the fact the extradition case has not been brought

to trial within a reasonable time, to a final conclusion, the warrant of extradition has expired by limitation of law, and the imprisonment under it is consequently illegal.

Nor does the warrant of extradition confer any authority on the sheriff. It does not run to him and the record shows he was never appointed by the United States to hold the custody. The point has been sufficiently discussed in the brief and elsewhere in this argument. It is by virtue of the existence of the warrant of extradition that the United States exercises over the accused the power and authority conferred by Section 5275 of the Revised Statutes; and for that all important purpose it is essential that the person holding the custody of the accused be appointed by the United States and the warrant expressly so requires.

V.

THE INTERNATIONAL WARRANT OF EXTRADITION AS THE ONLY LAWFUL AUTHORITY FOR THE CUSTODY.

The custody of the accused is exclusively governed by the international warrant of extradition. The law of the extradition imports into the warrant all the terms and conditions on which the accused has been extradited, as fully as if set forth in words. The law is a part of the warrant, to the same extent exactly as if written into its provisions. What, then, are the terms of the warrant as thus interpreted? Manifestly,

> "that the accused shall be held in custody for the sole and only purpose of giving him a trial

> to a final conclusion, and within a reasonable time, upon the specific charge herein designated and upon which his extradition is granted; and upon no other charge shall he be arrested or brought to trial, until after he has first been given a reasonable time and opportunity subsequently to his final release or trial upon said charge on which he is extradited, to return to the country granting his extradition, and has failed so to do. And provided, further, that at no time prior to said expiration of his said right to return shall he be imprisoned, prosecuted or placed on trial for or on account of any charge whatsoever other than the said charge in this warrant designated, and for which and upon which the said extradition has been granted."

It follows that these terms and conditions of the international warrant of extradition, implied by law, are violated by the imprisonment of appellant and plaintiff in error, in this: In the first place, he has not been given a trial of the extradition case to a final conclusion within a reasonable time, but is being perpetually imprisoned on the charge upon which he was extradited and without trial; and in the next place, he has been arrested, prosecuted, convicted and sentenced on a charge altogether different from the one on which he was extradited, and this, too, while the extradition case was pending and awaiting trial, and while the extradition jurisdiction over his person existed and persisted in the full force and effect of its exclusive control in virtue of the supremacy of the law creating it, for the purpose of carrying out the sole and only object of the *treaty*—his trial to a conclusion and within a reasonable time on the specific charge described in the extradition proceedings. Although the United

States maintained in the *Lawrence* and *Winslow cases* that the person extradited may legally be arrested and tried on any charge, yet this was always held subject and subordinate to and qualified by the well established and always recognized rule that the extradition charge must *first* be brought to trial to a final conclusion, before the accused could be arrested or prosecuted on any other and different charge. In the Brief, at page 98 and following, this contention of the United States is fully discussed, and the precedents in course of diplomatic correspondence, are there cited in reference to the point.

Our position that the extradition case must *first* be brought to trial to a conclusion, and to the exclusion of every different charge, and within a reasonable time, is based primarily upon the supremacy of the law of the extradition, the treaty and Section 5275 of the Revised Statutes, over all the laws, judicial proceedings and process of the State of California, by virtue of Article 6 of the Constitution, thus making the incidental and resulting obligation imposed on the state to first obey the supreme law, one of paramount and supreme force. This special point, we may say in passing, did not arise in *United States* v. *Rauscher*, 119 U. S., 407, nor in *Cosgrove* v. *Winney*, 174 U. S., 64, nor in *Johnson* v. *Browne*, 205 U. S., 309, as they did not originate in the state courts, though it always has been the doctrine of international law required by the necessity of maintaining the complete integrity of the treaty, that the prosecuting state must first obey the law of the extradition in proceeding against the accused, and could not hold in check or intercept, in-

terfere with, obstruct nor postpone the due course of the extradition case in its regular and normal progress to a trial to a final conclusion, by arresting and prosecuting the accused on another and different charge, while the extradition case was pending and awaiting trial. Billot, who is universally recognized to be the leading and most distinguished authority on international extradition, says that this principle "must have precedence over every internal law." (Billot Traité de L'Extradition, page 308.) There can scarcely be the slightest doubt of this being the law. The prosecuting state would be powerless to proceed against the accused at all if it were not for the law of the extradition. It therefore has no power after availing itself of the enabling authority of this law to repudiate the incidental obligations the law imposes, and then substitute the local law and judicial process in another case, and in another prosecution,—a thing quite impossible if there had been no extradition.

> "The treaties," says Lawrence, speaking of extradition, "are obligatory on the component states as well as upon the nation. They control the law, the power of the legislature and the power of the judiciary, in the sense that an interior law cannot hold in check a stipulation of a regular treaty." (4 Lawrence's Com. sur Wheaton on International Law, page 503.)

This applies to stipulations implied as well as express and to all the obligations imposed by the extradition. And in any event, irrespective of international law, Article 6 of the Constitution of the United States is decisive of the question. *It is impossible therefore that the State of California possess any power to arrest or prosecute the accused*

on a subsequent charge of "subsequent offense" while the extradition case was pending and awaiting trial to a final conclusion and while the extradition jurisdiction over his person existed and persisted in the full force and effect of its exclusive control by virtue of the supreme law of the land for the one purpose of carrying into execution the provisions of the treaty and in that behalf effectuating the sole and only object of the extradition,—the trial of the accused to a final conclusion and within a reasonable time on the one specific charge on which he was extradited. This is the law even if it were true (and it is not), that the state may prosecute on a subsequent extraditable offense, without the necessity of a new extradition and without first affording the accused a reasonable time and opportunity to return to the country of asylum from which he had been forcibly taken on the preceding extradition. In the presence of the supreme law of the land, the laws and judicial process of the State of California necessary for the jurisdiction to arrest and prosecute the accused on the subsequent charge of subsequent extraditable offense, are as silent and inoperative for the time being, as if they never existed. It is a maxim of universal jurisprudence that *In praesentia majoris cessat potentia minoris.* As said in our Brief:

> "There can be no jurisdiction over the person without a law conferring it. If there are two 'laws' purporting to confer jurisdiction, and over the same person, one of these laws supreme, the other not, *there is but one jurisdiction, and that the jurisdiction of the supreme law.* The scope of its authority is an entirety and indivisible, for supremacy is necessarily

> entire and omnipotent within the sphere of its legitimate control. To permit an inferior law to exert authority in dominion over the subject assigned to the control of the supreme law, is to subvert the supreme law, and invade the domain of its exclusive jurisdiction. We say its 'exclusive jurisdiction' for if it is concurrent or subordinate, then the law is not and cannot be supreme. Even a concurrent jurisdiction becomes exclusive when it is the first to become vested either over the person or the subject-matter. The jurisdiction over a person extradited pursuant to *treaty*, is in its every aspect and operation, necessarily *sui generis*, and is not the ordinary or local jurisdiction which the prosecuting state possesses in the usual administration of its local criminal law."

Since this is all of it very self-evident, it is quite inexplicable how any one could have thought that the prosecuting state possessed the right of election as to different charges, where one is the basis of an international extradition and the other not. Says Spear in commenting on the meaning of Section 5275 of the Revised Statutes of the United States,

> "The fact that the president is authorized to protect the fugitive against lawless violence until the conclusion of his trial, and until his discharge from custody or imprisonment, and 'for a reasonable time thereafter,' shows that Congress regarded the case as a special one not falling into the ordinary category of persons arrested, tried and punished for crime. No such provision would have been made if the whole case, after the delivery, were simply one of municipal law, and had no relation to a custody granted by a foreign government under a treaty, and involved no obligation in respect to the use thereof. The theory of the legislation is that the United States, in obtaining the extradition of a fugitive criminal, acquires no

more power over his person than that which results from the treaty." (Spear on Extradition, 3rd Ed., pages 232, 233.)

This conclusion logically follows from the principle that the *treaty* is a special regulation of the pre-existing asylum secured by the accused, modifying or restricting it only to the limited extent of the particular extradition in a given case, and confirming it and perpetuating it for the benefit of the accused as against every charge and every prosecution not authorized by the particular extradition proceedings, thus prohibiting all arrests and prosecutions on so-called "subsequent offenses," except upon a new extradition, or when the accused waives his rights. In other words, the treaty is the exclusive source and measure of the power of the prosecuting state over the accused, for all purposes of a criminal prosecution on any charge. The right of asylum is not only conferred for the protection of political offenders, but as well for the protection of all persons victims of oppression or persecution in the lawless exercise of the powers of government, whether by means of the criminal law of the local jurisdiction or by any other method that may be pursued, to gratify private malice or personal vengeance. This right of asylum is established beyond all controversy, both by the common law and by the law of nations, irrespective of whether the accused is or is not a political offender. It is an inviolable guaranty of the common law.

Says Lawrence:

"The extradition by a country of its citizens and also of foreigners who are refugees therein, confident in the right of asylum, a right which

> is an inviolable attribute of all independent sovereignty, has no place in the common law, upon which the American and English have always relied for the protection of their persons, their liberty and their property." (4 Lawrence's Com. sur Wheaton Les Elements Du Droit International, pages 368, 371; 14 Albany Law Journal, page 88.)

It is also an inviolable guaranty of international law.

> "All independent states," says Heffter, "offer on their territory a natural asylum not only to their own subjects, but also to foreigners, as to the prosecutions coming from other nations against them. * * * The individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes, would be to violate the mutual principle of asylum and the silent clause contained by implication in every extradition." (Heffter, Droit International, par. Geffcken, pages 145, 150.)

Here we have the true view of the prohibition in its origin and reason as being exclusively related to the asylum reserved to the accused,—a condition *sine qua non* of every extradition; and showing its primary and essential purpose to be the protection of the reserved asylum and of the right of the accused to revert to that asylum on the termination of the extradition case and upon his final release from custody under the international warrant. This renders the prohibition in the reason and purpose of its existence, forcibly applicable to a collateral arrest and prosecution or a subsequent charge of subsequent offense. And Bernard places the prohibition on the same basis. He says:

> "The extradited person must not be tried on any charge but the one for the infraction which constitutes the object of the extradition. This principle is founded on the right of sovereignty of the country of asylum."

And the same distinguished authority says further on in his exhaustive and learned treatise:

> "Mr. Billot is of the opinion that the judicial power must not proceed to try the extradited person, where a new crime is discovered since the extradition. This means it cannot be done except by opening negotiations, so as to obtain an extension of the extradition."

This is directly in point.

> 2 Bernard Traité de L'Extradition, pages 483, 493, 510, 516, 670.

The logical and ultimate conclusion is and must be that as the *treaty* is simply a special regulation of the pre-existing asylum, it is of necessity the sole and only source of the power and measures the extent of the power of the demanding state over the person of the extradited accused, for all purposes of a criminal prosecution, and prohibits every arrest and every prosecution which is not authorized by the particular extradition, reserving to the accused the right of asylum as to all charges of offenses subsequently committed and placing him constructively in the territory of the sovereignty of asylum as against all such charges, thus necessitating a new extradition if they are extraditable, thereby conserving and protecting so far as is necessary, the right of asylum, the very foundation itself, and the dominant policy of the law of international extradition, to which all its doctrines, principles and rules are quite rightly

made subservient, and promotive, as well as protective.

It is the conclusion required by the well established principles of the law, that for the reasons we have given in the Brief and in this argument, the imprisonment of the appellant and plaintiff in error is in all its features, claims and pretensions, in violation of the Treaty of Extradition between the United States and Great Britain, in violation of Section 5275 of the Revised Statutes of the United States, in violation of international law, in violation of Section one of the Fourteenth Amendment, and of Article 6 of the Constitution of the United States.

It results that the judgments, respectively, of the Supreme Court of California and of the United States Circuit Court for the Northern District of California, should be *reversed* and suitable direction given that the appellant and plaintiff in error be restored to his liberty. The case is respectfully submitted.

GEORGE D. COLLINS,
Counsel for Appellant and for the Plaintiff in Error.

Dated at the City of Washington, in the District of Columbia, the fifth day of April, in the year of our Lord one thousand nine hundred and nine.

IN THE

Supreme Court of the United States

GEORGE D. COLLINS,
Plaintiff in Error,
vs.
THOMAS F. O'NEIL, The Sheriff of the City and County of San Francisco, THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA,
Defendants in Error.

No. 241.
OCTOBER TERM, A. D. 1908.

ON WRIT OF ERROR TO THE SUPREME COURT OF CALIFORNIA.

Brief and Argument on Behalf of Defendants in Error.

STATEMENT OF CASE.

In June, 1905, the plaintiff in error was put on trial in the Superior Court of San Francisco upon an indictment charging him with bigamy. During a recess of the Court, at his request, for two or three days, early in July, 1905, and while the jury was being empaneled in the cause, the plaintiff in error fled the jurisdiction of that Court and departed to Victoria, in Canada.

On July 13th, 1905, an indictment charging Collins with the crime of perjury, alleged to have been committed in San Francisco on June 30th,

1905, was duly found by the grand jury and filed in the Superior Court of San Francisco. Said indictment was designated in said Superior Court by number 16130. Proceedings were thereupon duly instituted to demand his surrender upon that indictment for perjury, (the charge of bigamy not being an extraditable offense) pursuant to the Extradition Treaty between the United States and Great Britain, and on, in pursuance thereof, on October 7th, he was surrendered and extradited, and removed from Victoria by Gibson, the agent designated in the Canadian extradition warrant (Rec., fols. 38 and 39, pp. 22 and 23), to San Francisco where he was placed in the custody of the then Sheriff, who had a bench warrant issued from the Superior Court on the perjury indictment. (Rec., fol. 40, p. 23.)

In conformity with an order accompanying this bench warrant he was released on bail. His trial upon the indictment upon which he had been extradited began early in December, 1905, and resulted in a disagreement of the jury on December 23d, 1905, and, by consent, this cause was then continued till about the middle of January, 1906, to be then reset for trial.

On December 29th, 1905, the grand jury of San Francisco found and presented another indictment against Collins charging him with perjury committed on December 12th, 1905, while testifying on his own behalf in the trial of the indict-

ment upon which he had been extradited. A bench warrant was issued for his arrest on this last indictment, with an order admitting him to bail.

He was arraigned on the indictment for this *subsequent perjury* in January, 1906, and after rulings, adverse to his contentions upon several motions and demurrer, he entered his plea of "Not Guilty", and the trial of that cause began early in February, 1906, and resulted in a verdict of "guilty" on February 27th, 1906. Thereafter on that verdict, on March 10th, 1906, he was sentenced to imprisonment in the State Prison for a term of fourteen years.

From this judgment he prosecuted an appeal to the District Court of Appeal of California, but not urging in that appeal any of the questions of his extradition rights herein contended for by him, although he alleges he had presented the same in the trial court. (Rec., fols. 6 and 7, p. 4.)

On this appeal the judgment and orders of the trial court were affirmed, and thereafter he applied to the State Supreme Court for a rehearing by that Court of his appeal, but that Court denied a rehearing. (*People* v. *Collins*, 6 Cal. App. Rep. 492; s. c. 92, Pac. Rep. 513.)

In December, 1906, Collins applied to the State Supreme Court for a writ of *habeas corpus*, claiming that his conviction and sentence thereon were void, and in excess of the jurisdiction of the State Court as being in contravention of his extradition

rights, under the treaty between the United States and Great Britain, and section 5275, U. S. Revised Statutes. (Rec., fols. 1 to 16, pp. 1 to 9.) The Chief Justice ordered a writ to issue. (Rec., fol. 16, p. 9.) In answer to this writ a complete return (denying almost all of the allegations of the petition, and setting upon affirmative matter in justification of the restraint) was filed in that Court on behalf of the Sheriff. (Rec., fols. 17 to 41, pp. 10 to 24.) To this return the petitioner filed certain exceptions and an answer. (Rec., fols. 42 to 60, pp. 24 to 35.)

Upon the pleadings as presented therein, the State Supreme Court heard testimony, and after arguments, on May 22d, 1907, that Court filed its opinion (Rec., fols. 61 to 64, pp. 35 to 41) and its judgment (Rec., fol. 65, p. 42), whereby it remanded Collins to the custody of the Sheriff, in pursuance to the process issued in both cases; that is in the extradition case, and in the case where judgment of imprisonment had been pronounced.

An application was then made by the petitioner for a writ of error from the United States Supreme Court, but the same was not sued out until November 8th, 1907. (Rec., fols. 77 to 82, pp. 48 to 51.) And the present writ of error is the one allowed by the Chief Justice of the Supreme Court of California.

In December, 1907, Collins applied to the United States Circuit Court for the Northern District

of California for a writ of *habeas corpus*, upon the same grounds urged in this writ of error, and that Court on the 6th day of January, 1908, declined to order the writ to issue upon the authority of *Ex parte Collins*, 154 Fed. Rep. 980, and *In re Frederick*, 149 U. S. 77. However, the Circuit Judge allowed him an appeal to this Court from that order.

This Court, in January, 1909, with the consent of the appellees in the appeal, and the defendants in error herein, ordered that appeal and this writ of error, advanced on the calendar, and to be heard together, on April 5th, 1909.

A separate brief and argument on that appeal has been filed in this Court.

In presenting the matters to be herein considered this brief and argument will be divided into two parts: the **first part** will be a direct argument in support of the correctness of the decision of the State Supreme Court, and the **second part** will be an answer to the brief and argument heretofore filed by the plaintiff in error.

FIRST PART.

The custody of the prisoner by the Sheriff, pending his delivery to the Warden of the State Prison, in execution of the judgment of the trial Court is legal, and is not in violation of any of the rights of the prisoner under the treaty between the United States and Great Britain, or of the Constitu-

tion of the United States, or of any Act of Congress.

The plaintiff in error was in July, 1905, regularly on trial upon an indictment for bigamy, and, before the empanelment of the jury in that cause was completed he fled the jurisdiction of California and sought refuge and asylum in Canada. Upon the charge of bigamy, under the provisions of our treaty with Great Britain, he could not be extradited, and therefore, by reason of such fact and by reason of his flight, he is practically immune from punishment for that offense.

However, on June 30th, he committed perjury in San Francisco, and was indicted therefor by a grand jury. Upon proper demand he was extradited from Canada, therefor, in October, 1905, after such extradition, in open Court, on December 12th, 1905, in the trial of the cause upon which he had been extradited, he commits a *second* and *subsequent perjury*, for which, on December 29th, 1905, the grand jury indicts him. The trial upon the extradition offense ends in a disagreement of the jury. Then without a final determination of that cause, he is placed on trial for the *second* and *subsequent perjury*, and is found guilty and sentenced.

The questions then presented are: What are the rights of California in punishing him for such subsequent offense?

Do the provisions of the treaty between the Uni-

ted States and Great Britain, or the Constitution of the United States, or any Act of Congress prohibit the State of California from punishing an offender for a crime committed subsequent to extradition, and before a final disposition of the extradition offense, *and* without new extradition proceedings being had for the *subsequent offense?*

Cannot California deal with the offender, as to the *subsequent offense,* as though no extradition proceedings had been had, and without the provisions of the treaty or the laws of the United States, operating by way of limitation or prohibition, in the enforcement of its penal statutes?

Rights of a Fugitive from Justice, as to Prior Offenses.

It seems to be definitely determined now that in the absence of any treaty in relation to fugitives from justice, that no absolute right of demand for surrender exists, and that such fugitive could seek asylum in another country, and be absolutely safe from molestation or punishment for his crimes.

However various governments awoke to a realization that such immunity should not indiscriminately be granted, and therefore treaties were enacted, whereby certain offenses were made extraditable.

In 1842 the United States and Great Britain

made and ratified such a treaty. The tenth article of this treaty contains all that relates to the subject of extradition of criminals, and that article reads as follows:

> "It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the

proper Executive authority, that a warrant may issue for the surrender of such fugitive."

This treaty was supplemented by the acts of Congress of August 12th, 1848, and March 3rd, 1869, the provisions of which are embodied in sections 5270, 5272 and 5275 of U. S. Revised Statutes.

Section 5275 of U. S. Revised Statutes reads as follows:

> "Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offences specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offences, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe keeping and protection of the accused."

In 1870 the Extradition Act of Great Britain (33-34 Vict. C. 52) was passed, in furtherance of the treaty, and the parts thereof material to this argument read as follows:

"**Restrictions on Surrender of Criminals.** The following restrictions shall be observed with respect to the surrender of fugitive criminals.

(2) A fugitive criminal shall not be surrendered to a foreign state, unless provision is made by the law of that state or by an arrangement that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to her Majestie's Dominions, be detained or tried for any *offense committed prior* to his surrender other than the extradition crimes proved by the facts on which the surrender is grounded."

Then in 1886 the Canadian Extradition Act was passed in furtherance of the treaty (vol. 1, Moore on Extradition, p. 682), and section 23 thereof reads as follows:

"Whenever any person accused or convicted of any extradition crime is surrendered by a foreign state, in pursuance of any extradition arrangement, such person shall not, until after he has been restored or has had an opportunity of returning to the foreign state within the meaning of the arrangement, be subject, in contravention of any of the terms of the arrangement, to any prosecution or punishment in Canada for any other offence *committed prior* to his surrender, for which he should not, under the arrangement, be prosecuted."

Then the Canadian Government on May 2d, 1889, passed "An Act to Extend the provisions of

the Extradition Act", and which according to Moore has not been put into force respecting any foreign state, as provided by its fourth section. (Vol. 1, Moore on Extradition, p. 692.) The Act, excepting the schedule of offences reads as follows:

"An Act to Extend the Provisions of the Extradition Act.

(52 Vic. ch. 36.)

(Assented to 2d May, 1889.)

Whereas it is expedient to make further provision for the extradition from Canada of fugitive offenders from foreign states: Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enact as follows:—

Fugitive offenders may be surrendered though there is no convention—Provisions of Revised Statutes of Canada, ch. 142, to govern.

1. In case no extradition arrangement, within the meaning of "The Extradition Act," exists between Her Majesty and a foreign state, or in case such an extradition arrangement, extending to Canada, exists between Her Majesty and a foreign state, but does not include the crimes mentioned in the schedule to this act, it shall, nevertheless, be lawful for the Minister of Justice to issue his warrant for the surrender to such foreign state of any fugitive offender from such foreign state charged with or convicted of any of the crimes mentioned

in the schedule to this act; Provided always, that the arrest, committal, detention, surrender and conveyance out of Canada of such fugitive offender shall be governed by the provisions of "The Extradition Act," and that all the provisions of the said act shall apply to all steps and proceedings in relation to such arrest, committal, detention, surrender and conveyance out of Canada in the same manner and to the same extent as they would apply if the said crimes were included and specified in an extradition arrangement between Her Majesty and the foreign state, extending to Canada.

As to costs.

2. All expenses connected with the arrest, committal, detention, surrender and conveyance out of Canada of any fugitive offender under this act shall be borne by the foreign state applying for the surrender of such fugitive offender.

Law of Canada to govern as to crimes.

3. The list of crimes in the schedule to this act shall be construed according to the law existing in Canada at the date of the commission of the alleged crime, whether by common law or by statute made before or after the coming into force of this act, and as including only such crimes, of the description comprised in the list, as are, under that law, indictable offences:

Application of act.

(2) The provisions of this act shall apply to any crime mentioned in the said schedule,

committed after the coming into force of this act, as regards any foreign state as hereinafter provided.

Coming into force of act.—Abrogation by proclamation.

4. The foregoing provisions of this act shall not come into force with respect to fugitive offenders from any foreign state until this act shall have been declared by proclamation of the Governor-General to be in force and effect as regards such foreign state, from and after a day to be named in such proclamation; and the provisions of this act shall cease to have any force or effect with respect to fugitive offenders from any foreign state, if by proclamation the Governor-General declares this act to be no longer in operation as regards such foreign state.

Day to be named.

(2) The day from and after which, in such case, the provisions of this act shall cease to have force and effect shall be a day to be named in such proclamation.

When warrant may not be issued.

5. This act shall not authorize the issue of a warrant for the extradition of any person under the provisions of this statute, to any state or country in which, by the law in force in such state or country, such person may be tried after such extradition for any other offence, than that for which he has been extradited, unless an assurance shall first have been given by the executive authority of such state

> or country, that the person whose extradition has been claimed shall not be tried for any other offence than that on account of which such extradition has been claimed."

And finally in 1889 an "Extradition Convention" was concluded between the United States and Great Britain and proclaimed March 25th, 1890. (U. S. Stats., vol. 26, p. 1508.)

Article III thereof reads as follows:

> "No person surrendered by or to either of the High Contracting Parties shall be triable or to be tried for any crime or offense, committed **prior to his extradition**, other than the offense for which he was surrendered, until, he shall have had an opportunity of returning to the country from which he was surrendered."

Article VI thereof reads as follows:

> "The extradition of fugitives under the provisions of this Convention and of the said Tenth Article (of treaty 1842) shall be carried out in the United States and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State."

The foregoing are all of the treaties and conventions ratified by the United States and Great Britain, and all of the legislative enactments of the United States, Great Britain and Canada, in furtherance of such treaties and conventions, and

all limitations, restrictions or prohibitions must be found therein, and no immunity exemption can be added thereto by implication. Furthermore, these must be interpreted and construed in connection with the intent of the contracting parties, as therein expressed, and if there are explicit declarations therein in relation to the subject matter, it follows as a maxim of law that other matters, which might have been therein expressed, are excluded from the protective operation of their provisions.

In construing the provisions of the treaty of 1842 (which had no specific mention of exemption from prosecution for any other prior offense) there were several decisions, which were entitled to great consideration, which held that no immunity existed as to other prior offenses:

In *U. S.* v. *Caldwell*, 8 Blatchford, 131, Judge Benedict says:

> "While abuse of extradition proceedings, and want of good faith in resorting to them, doubtless constitute a good cause of complaint between the two governments, such complaints do not form a proper subject of investigation in the courts, however much those tribunals might regret that they should have been permitted to arise. * * * But whether extradited in good faith or not, the prisoner, in point of fact, is within the jurisdiction of the court, charged with a crime therein committed; and I am at a loss for even

a plausible reason for holding, upon such a plea as the present, that the court is without jurisdiction to try him. * * * And I cannot say that the fact that the defendant was brought within the jurisdiction by virtue of a warrant of extradition for the crime of forgery affords him a legal exemption from prosecution for other crimes by him committed."

Again, in *U. S.* v. *Lawrence*, 13 Blatchford, 295, Judge Benedict also says:

"This ground of defence is, therefore, dismissed, with the remark that an offender against the justice of his country can acquire no rights by defrauding that justice. Between him and the justice he has offended, no rights accrue to the offender by flight. He remains at all times, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm."

"It is true that it (the Act of Congress) assumes, as well it may, that the offender will be tried for the offence upon which his surrender is asked, but there are no words indicating that he is to be protected from trial for all other offences. The absence of any provision indicating an intention to protect from prosecution for other offences, in a statute having no other object than the protection of extradited offenders, is sufficient to deprive of all force the suggestion that the Act of 1869, as a legislative act, gives to the treaty of 1842 the construction contended for by the accused."

Sustaining a like doctrine is the case of *Adriane* v. *Lawrence*, 59 N. Y. 110.

Opposed to the doctrines determined in those cases, there are a number of other decisions which hold that a fugitive criminal, having been surrendered under the extradition treaty, could not be tried for any other offense than the one upon which demand for surrender was made, either included in such offense or committed prior thereto, until the extradition crime was finally disposed of, and he had had a reasonable time within which to return to the surrendering country.

U. S. v. *Watts*, 8 Sawyer, 370;
Ex parte Hebbs, 26 Fed. Rep. 421;
Com. v. *Hawes*, 13 Bush (Ky.), 697;
Blandford v. *State*, 10 Tex. Ct. App. 627;
State v. *Vanderpool*, 39 Ohio St. 273;
U. S. v. *Rauscher*, 119 U. S. 407;
Johnson v. *Browne*, 205 U. S. 309.

At the time of the decision of *U. S.* v. *Rauscher*, 119 U. S. 407, the Extradition Convention of 1889, containing Article III, which explicitly mentions exemption from prosecution for *prior offenses*, was not in existence. The Court was there dealing exclusively with the treaty of 1842 and section 5275, U. S. Revised Statutes. In the *Rauscher Case*, at page 420, the following language is used:

> "It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognized public law which had pre-

vailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offences enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject. It is unreasonable to suppose that any demand for rendition framed upon a general representation to the government of the asylum, (if we may use such an expression,) that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any particular offence with which he was charged, and even without specifying an offence mentioned in the treaty, would receive any serious attention; and yet such is the effect of the construction that the party is properly liable to trial for any other offence than that for which he was demanded, and which is described in the treaty. There would, under that view of the subject, seem to be no need of a description of a specific offence in making the demand. But, so far from this being admissible, the treaty not only provides that the party shall be charged with one of the crimes mentioned, to-wit, murder, assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper, but that evidence

shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offence, and that this evidence shall be such as according to the law of that country would justify the apprehension and commitment for trial of the person so charged. If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offence is charged to have been committed, there is very little use for this particularity in charging a specific offence, requiring that offence to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it."

And at page 424 thereof the following language is used:

"That right, as we understand it, is that he shall be tried only for the offence with which he is charged in the extradition proceedings and for which he was delivered up, and if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime *committed previous* to his extradition."

When the case of *Johnson* v. *Browne*, 205 U. S. 309, was decided, the Extradition Convention of 1889 was in force and effect and this Court was

there called upon to construe Article III thereof, solely in connection with the facts there disclosed. And what this Court decided in that case was that where a person had been convicted in the United States and sentenced, and, pending an appeal therefrom, had become a fugitive from justice, he could not thereafter be imprisoned in execution of such judgment, as his extradition was for another *prior offense*. Furthermore, it appeared that the Canadian Government had refused to extradite him for execution upon the judgment holding that it was not an extraditable offense.

Therefore, in all of these cases when the Court speaks of not allowing a person to be tried for *"any other or different crime"* than the one upon which extradition was granted, until the "extradition crime" has been disposed of, such general declarations of legal doctrines are only applicable to the facts of the case in which they are used. In all of the cases referred to this Court was dealing with the question of *contemporaneous* or *prior* offenses, and the language of the opinions can only be considered as declarations of legal doctrines as applied thereto. No intention is shown that they were to be treated as "legal maxims" applicable to every extradition case.

We have thus fully discussed, and called attention to, these decisions as to *prior offenses* in order to emphasize our position, that they do not apply to *subsequent offenses,* and we shall now pro-

ceed to discuss the rights of a surrendered fugitive from justice as to any *subsequent* violation of law by him.

The Rights of a Fugitive from Justice as to Subsequent Offenses.

After a fugitive criminal is surrendered by the agent designated in the "Extradition Warrant" to the Sheriff (who is the person designated by law as the proper party to receive him, where a State law has been violated) *instanter* the provisions of such warrant have been complied with, and the warrant itself becomes *functus officio.*

U. S. v. *Watts,* 8 Sawyer, p. 383;
State v. *Vanderpool,* 39 Ohio St. 273.

In the latter case the Court says:

> "After the United States has secured the surrender for an offense against state law, the accused is delivered to the authorities of the State for prosecution, when all federal control is lost."

From that time on the receiving state has jurisdiction of the surrendered fugitive under and by virtue of the process of the state court issued in the cause upon which extradition was demanded and granted. The vesting or grant of this jurisdiction over the custody and disposition of the fugitive is to be exercised under any limitations or restrictions contained in the treaty between the demanding and surrendering governments, and also to any

such contained in the Federal Constitution or Statutes. If no restrictions or limitations are imposed in relation thereto, the prisoner can be treated in all respects as though he had been surrendered under the provisions of interstate rendition, and as though the extradition proceedings had as their sole force and object his transfer from the jurisdiction of one sovereignty to that of another. In other words, the fugitive might be tried for any offense committed *prior* or *subsequent* to his surrender.

Lascelles v. *Georgia,* 148 U. S. 537.

However, as we have shown heretofore, the treaty between the United States and Great Britain does impose restrictions and limitations in relation to his treatment as to the offense for which he was extradited, and as to any other prior offense, not specified in the demand for his surrender, and as to such other or prior offenses, he cannot be arrested or tried until after the final disposition of the extradition crime, and until a new extradition warrant is granted, if the fugitive does not abide beyond a "reasonable time" within the jurisdiction of the "receiving" country.

As to any crime committed by him *subsequent* to his extradition and surrender, he is not clothed with any protection by the provisions of the extradition warrant, the treaty or federal enactment, and he may be arrested, tried, convicted and sentenced,

in entire disregard of any extradition, and as though no demand or surrender had ever been made.

Ex parte Collins, 151 Cal. 340;
Ex parte Collins, 154 Fed. Rep. p. 984;
Spear on Extradition, (3d ed.), p. 84.

Referring to Spear in the *Rauscher Case* this Court refers to his book as "a very learned and careful work." At page 84 of this work he says:

> "Crimes after Extradition.—The fact, moreover, that the extradited party is not by these general stipulations protected against trial for any offenses which he may commit against the receiving Government subsequently to his extradition, and while in its custody, or after his discharge therefrom, has no relation to the question whether he is thus protected in respect to offenses preceding his extradition, other than the one which was the ground of his surrender. The two cases are not parallel.
>
> "As to all crimes committed against the demanding Government prior to his extradition, the surrendered fugitive had the right of asylum within the territory of the Government asked to make the delivery; and the latter withdrew from him the right only in reference to the crime for which it surrendered him to the former, without any protection in regard to offenses which he might commit while in its custody, and after his extradition. As to such offenses, if committed, he never had an

asylum within the jurisdiction of the delivering Government.

"There is, hence, a broad distinction, in their relation to the two Governments, between crimes committed after and those committed before delivery. Extradition implies no immunity in respect to any of the former, since it has no relation to them; but in respect to the latter it is delivery for the specific crime charged and proved, and hence, the custody secured by it can be properly used only for the trial and punishment of that crime."

In the case of *Ex parte Collins*, 151 Cal. 340, (which is the decision to be reviewed by this writ of error) and which is an opinion in which the seven justices of that Court concur, beginning at page 344 the following language is used:

"In the Rauscher case, as well as in every other case that has been called to our attention, the crime for which it was sought to try the extradited prisoner was one alleged to have been committed prior to his extradition. In the present case, on the contrary, the crime with which Collins was charged and of which he was convicted was committed after his surrender by the authorities of the country in which he had sought a refuge, and after his return to the state of California.

"The question is whether the immunity against prosecution for another offense, declared in *United States* v. *Rauscher* and similar cases, extends to an offense committed sub-

sequent to the extradition. No doubt there is language in *United States* v. *Rauscher,* general in its terms, which, taken without regard to the facts before the court, would lend countenance to the view that the prisoner is, until the conclusion of his trial for the offense on which he was extradited, and for a reasonable time thereafter, absolutely immune from prosecution on any other charge. It is an elementary doctrine, however, that expressions in judicial opinions are to be read in the light of the facts before the court, and it is necessary, therefore, to consider the grounds upon which the decision in this class of cases went in order to determine whether those grounds are applicable to the case of a crime committed after the extradition.

"The reasoning of *United States* v. *Rauscher* is substantially this: That in the absence of treaty there is no obligation upon any country to surrender to another persons who are charged with crime in the latter country. That as a matter of comity such surrender might be made, but that if made in pursuance of a demand or request for the surrender of a person accused of a specific crime, there is an implied undertaking on the part of the country receiving the surrender that such surrender is asked and received for the purpose of putting the accused on trial for that crime and for no other purpose. When a treaty is adopted, providing for the surrender of persons accused of specific crimes, the same implied obligation exists, more particularly in view of the

provision generally found in treaties of extradition that before any surrender shall be made there must be some proof of the commission of the offense. To permit a country to seek the extradition of a person found in another country upon the ground that he is charged with the commission of a specific offense covered by an extradition treaty, and then, when his surrender has been granted upon that ground, to try him for some other offense would make it possible to evade the provisions of the treaty, and to use it as a pretense for securing possession of the person of a prisoner whom it was not designed to try for the charge upon which his extradition was nominally sought, but for some other offense which might or might not be in itself extraditable. In the language of the court in the case under consideration, 'it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted his extradition.'

"The doctrine, then, seems to rest ultimately upon the view that the treaty of extradition is intended to provide for the surrender of persons who may have fled from one country to another after committing one of a number of designated crimes, and that it would be a breach of international faith to

use the provisions of this treaty for any other purpose than the one which is stated in the demand for the surrender,—namely, that the prisoner may be put upon his trial for the specific offense designated in the proceedings. In the absence of this limitation, it would be possible to make up a fictitious case coming nominally within the terms of the treaty, and, having secured possession of the prisoner, to then disregard the charge upon which he was extradited, and proceed to try him upon some other offense which could not have been made the basis of extradition, because not covered by the treaty, or a charge upon which extradition, even if the crime charged was named in the treaty, might have been refused.

"But no such considerations apply to the case of an offense committed after the surrender and return of the accused. While it may be the policy of a country in which a person has taken refuge to grant him the right of asylum except as against a specific charge of a crime covered by a treaty of extradition, such country, after it has once extradited him, cannot be concerned in securing for him immunity for new crimes committed after his return to the demanding country. The obligation assumed by the country demanding the surrender is that such surrender will not be used for the purpose of putting the prisoner on trial for any other offense which he may be claimed to have committed before he sought the asylum of the foreign country, but we cannot see that there would be any breach of international faith in compelling him, in com-

mon with other persons within the jurisdiction, to assume responsibility for any offense which he may commit after his return. In such case there is no possibility of the extradition proceedings being used as a subterfuge to pursue the accused for an offense other than the one for which he was extradited. In the absence of any authority compelling such conclusion, we are not prepared to hold that a person extradited under a treaty may, after his return, and pending his trial upon the extradition charge, commit any crime, however atrocious, with absolute security against prosecution until he shall have had an opportunity to return to the country from which he was taken.

"The immunity of an extradited prisoner from prosecution for any offense other than the one for which he was extradited rests not upon any absolute right in him to have an asylum in the land in which he has taken refuge, but primarily upon the rights of the sovereignty which has surrendered him, and has done so pursuant to a treaty. This is illustrated by the many cases holding that where an accused is forcibly seized in another country and transferred by violence, force, or fraud to this country, without resort to any extradition treaty, he cannot rely on the circumstances of his removal to defeat his prosecution and trial when here. (*Ex parte Scott,* 9 Barn. & C. 446; *Lopez & Sattler's Cases,* 1 Dearsley & B. [Eng.] C. C. 525; *State* v. *Smith,* 1 Bailey, [S. C.] 283, [19 Am. Dec.

679]; *State* v. *Brewster*, 7 Vt. 118; *Dow's Case*, 18 Pa. 37; *State* v. *Ross*, 21 Iowa, 467; *The Richmond* v. *United States*, 9 Cranch, 102. See, also, *Ker* v. *Illinois*, 119 U. S. 436, [7 Sup. Ct. 225]; *In re Mahon*, 34 Fed. 525.)

"'The fundamental principle upon which the doctrine of these cases rests, is this: The criminal himself never acquires a personal right of asylum or refuge from the consequences of his crime anywhere. The government of the state or country to which he flees may insist that he shall not be extradited from there unless by its consent and under such conditions as it shall assent to.' (Hawley on International Extradition, 15.)

"In the Rauscher case itself there are one or two expressions indicating that the court intended to limit the doctrine declared to cases of offenses committed prior to the extradition. In speaking of the right of the accused, the court says: 'That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up; and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime *committed previous to his extradition*.'

"And at another place the opinion refers to the immunity from arrest, trial, and conviction for a crime 'not enumerated in the extradition treaty *and committed before his removal*.' (The italics are ours.)

"Much force is added to the view that the accused is not protected from prosecution for crimes committed subsequent to his extradition by a consideration of the terms of the treaty under which Collins was surrendered.

"The treaty involved in the Rauscher case was that of 1842 with Great Britain. That treaty merely provided for the surrender by the respective contracting governments of persons charged with certain enumerated crimes, the surrender to be made upon such evidence of criminality as would justify arrest and commitment for trial in the country which was asked to surrender the accused. There was no express limitation as to the crimes for which the accused might be tried after surrender. Such limitation was held by the court to be implied in the nature of the treaty itself, and there was no occasion to define its precise extent.

"In 1889 the United States of America and Great Britain concluded an extradition convention which, after referring to the treaty of 1842, made certain further provisions. Article III of the treaty of 1889 (26 Stats. 1509) reads as follows: 'No person surrendered by or to either of the high contracting parties shall be triable or tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.' By this provision the contracting governments reduced to an ex-

press and definite agreement the exemption which had been before implied. It seems clear that in limiting the exemption to crimes committed prior to extradition, the contracting parties indicated their intent that persons surrendered should not be exempt from prosecution for crimes subsequently committed. If under the former treaty there was any exemption for such subsequent crimes (which, as we have said, was not in our opinion the case) such exemption was removed by the new treaty.

"It is urged that the effect of article III of the treaty with Great Britain is modified by the provisions of article VI of the same treaty, providing that 'The extradition of fugitives under the provisions of this convention and of the said tenth article (of the treaty of 1842), (8 Fed. Stats. Ann., p. 567), shall be carried out in the United States and her majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering state.' We are not furnished with any copies of the laws of the Dominion of Canada and none are at the present time accessible to us. On the hearing the petitioner, after qualifying as a witness regarding the laws of Canada, testified that the Extradition Act of Canada provided that 'This act shall not authorize the issue of a warrant for the extradition of any person under the provisions of this statute, to any state or country in which, by the law in force in such state or country, such person may be

tried after such extradition for any other offense than that for which he was extradited, unless an assurance shall first have been given by the executive authority of such state or country that the person whose extradition has been claimed shall not be tried for any other offense than that on account of which such extradition has been claimed.'

"For the reasons already stated we do not think that this statute was intended to protect persons surrendered from trial for subsequent offenses, but if it was, its only effect was to lay down a rule for the government of officials of the Dominion of Canada. They may, under this act, have had the right to refuse to surrender the accused without receiving the assurance referred to in the act. If they did surrender him without such assurance, the rights of the United States and of the state of California after receiving the prisoner were limited only by the provisions of the treaty, and that treaty, as we have seen, did not prevent trial for a subsequent offense."

In the case of *Ex parte Collins*, 154 Fed. Rep. 980, (which is one of the authorities relied upon by the United States Circuit Judge in declining to issue a writ of *habeas corpus*, and the appeal from which order is to be considered by this Court with this writ of error) at page 984, that learned Judge says:

"In response to these contentions, the district attorney has contented himself with calling the court's attention to the decision of the

Supreme Court of California referred to in the return. An examination of that case shows that that was an application for petitioner's release on *habeas corpus* upon substantially the same facts as those presented here, and that petitioner indulged very largely in the same course of reasoning before that court as has been urged by him here. The opinion is exhaustive and goes very fully into the questions presented with great thoroughness and consideration; but, without repeating the argument by which the court reached its conclusion, it is sufficient to say that its judgment was adverse to the petitioner's contention; the court, with the concurrence of all the justices, holding that the offense of which petitioner was convicted was one committed subsequently to his removal to the United States, and as such was not within the protection of the treaty of extradition with Great Britain nor the provisions of the Revised Statutes invoked by petitioner; and that it was competent for the state, under the circumstances, to proceed with the prosecution of such subsequent offense, notwithstanding the extradition charge remained undetermined in its courts. The reasoning of the court is very persuasive of the correctness of its conclusion; and, in addition to what is there said, it may be suggested that a construction of the treaty in accordance with the contention of the petitioner would leave the high contracting parties largely powerless to protect their laws against the most flagrant infractions by malefactors brought into the

country of either party thereto by extradition. Since, if petitioner is, under the circumstances, protected from prosecution for the offense in question, he would be equally protected as against murder, arson, or treason, or any other in the category of crimes, however heinous; and it is obvious that the mere right to follow him to the country of asylum for further remand, with all the chances of escape, would afford very poor promise of vindication to an offended law. Such a construction, it would seem, should not be indulged upon any light consideration, nor unless compelled by the most explicit language of the treaty."

These two decisions, and the extract from Spear, are the only instances which, after a careful and diligent search, I have been able to find where the legal doctrines are declared, which are applicable to the case of a surrenderd fugitive, who has committed a crime *subsequent* to his extradition, and before the extradition case has been finally disposed of.

The reasons therein announced are logical and sound, and should be reaffirmed and approved by this Court. If they are not, then the plaintiff in error might, in this very case, be guilty of a contempt of this Court, and this Court would be powerless to assume jurisdiction of his person, and punish him therefor, because it would be an invasion of a so-called *federal custody,* which had previously vested under the extradition warrant

and the treaty, and which could not be invaded or disturbed.

It has been said by this Court, "a treaty is a law "of the land, as an Act of Congress is, whenever "its provisions prescribe a rule by which the rights "of the private citizen or subject may be deter- "mined. And when such rights are of a nature to "be enforced in a court of justice, that court re- "sorts to the treaty for a rule of decision for the "case before it as it would to a statute."

U. S. v. *Rauscher*, 119 U. S. p. 419;
Chew Hong v. *U. S.*, 112 U. S. 536, 540, 565.

The treaty, and supplemental extradition convention, must control, and being, together, of subsequent adoption to the enactment of section 5275, U. S. Revised Statutes, abrogate such parts of that statute, if any, which are in conflict therewith. But we do not contend that section 5275 restricts in any way the legal doctrine announced by the California Supreme Court.

Constitution U. S., sec. 2, art. VI;
1 Moore on Extradition, sec. 82, and cases cited.

That author in that section says:

"A treaty constitutionally concluded and ratified is, subject to the provisions of the federal constitution, the supreme law of the land, abrogating all *prior* inconsistent laws, whether

national or state, and overriding conflicting provisions in the constitutions of the state."

In the case of *Johnson* v. *Browne*, 205 U. S. at pages 317 and 320, in discussing the treaty of 1842, and the Extradition Convention of 1889 (which latter in article III specially refers to *prior offenses*) the opinion deals with the question at issue by examining the "manifest scope and object of " the treaty itself."

Also, in *U. S.* v. *Rauscher*, 119 U. S. at page 420, it is said:

"It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offences enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject. It is unreasonable to suppose that any demand for rendition framed upon a general representation to the government of the asylum, (if we may use such an expression,) that the party for whom the demand was made was guilty of some violation of the laws of the country

which demanded him, without specifying any particular offence with which he was charged, and even without specifying an offense mentioned in the treaty, would receive any serious attention; and yet such is the effect of the construction that the party is properly liable to trial for any other offence than that for which he was demanded, and which is described in the treaty. There would, under that view of the subject, seem to be no need of a description of a specific offence in making the demand. But, so far from this being admissible, the treaty not only provides that the party shall be charged with one of the crimes mentioned, to wit, murder, assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper, but that evidence shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offence, and that this evidence shall be such as according to the law of that country would justify the apprehension and commitment for trial of the person so charged. If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offence is charged to have been committed, there is very little use for this particularity in charging a specific offence, requiring that offence to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it."

Let us now, therefore, consider the "manifest "scope and object of the treaty" for the purpose of determining whether, in the contemplation of the representatives of the two governments, formulating the provisions of the treaty or convention, that a "fugitive criminal" could not be punished for any violation of the law subsequent to his surrender, and until the extradition case was finally disposed of. From an examination of the treaty, and all legislation in relation thereto by the United States, Great Britain, or Canada, it is clearly manifest that there is an initial assumption that some crime *has been* committed. There is no demand, or process, or any limitation in any of those treaties, or enactments, which implies, or expresses, any intention or purpose to deal with any situation *not then in esse;* that is, they are not concerning themselves with a *future* and unborn criminal act of the "fugitive." He could not be a "fugitive criminal" for any act not yet done by him. There could be no specifications, in the demand or requisition for surrender, for any offense which *might be* committed in the *future.*

The "meeting of the minds" of those representatives of the government was a treaty contract in relation to things which had been acted. As to those acts a schedule, or enumeration of certain offenses, was determined upon (from which political offenses, misdemeanors, etc., were eliminated) and for such enumerated offenses, upon proper de-

mand, it was agreed that the high contracting parties would surrender a "fugitive from justice," in order that he might be dealt with, in the country from which he fled, according to the laws of that state. In order that a surrender should not be obtained through fraud, it was further provided that the fugitive must be tried for the offense with which he was accused, and not for any other prior offense. How could any fraud be perpetrated in making a requisition for a "fugitive criminal" for an offense not yet committed.

The "manifest scope and object" of the treaty was to deal with the present and past offenses, and the future was only considered in relation to the return of such fugitive to the surrendering country, after an acquittal, and in connection with his status as a criminal *at the time of extradition.* It was never for a moment considered, by the treaty making powers, that a "fugitive criminal" was to be clothed with all the immunity from arrest or punishment with which a minister, ambassador or consul is vested while domiciled as a representative of his government.

It was never contemplated by the treaty makers, nor do I believe that any court, by its judicial determination, shall declare that there shall be ingrafted onto the treaty, by implication, an absolute *carte blanche* to an extradited "fugitive criminal" to commit, with impunity, any number of extraditable or non-extraditable crimes, while awaiting trial for the "extradition crime."

If the *subsequent crime* is an extraditable one, then, suavely asserts the plaintiff in error, "you may " obtain a new extradition, after I have returned " to the country where I first sought an asylum as " a fugitive criminal"; if not extraditable, then he boldly asserts "I am immune from punishment, so " long as I absent myself from the jurisdiction " where I sinned."

This contention for my construction of a "fugi- " tive's" rights, under the treaty, is not urged upon the assumption that if not maintained it would allow criminals to escape, because this Court has said in *Johnson* v. *Brown,* 205 U. S. page 321, that, even though such result might follow, the treaty is to be construed by its express terms, and its " manifest scope and object." This contention is urged because the treaty was never intended to apply to *subsequent offenses.*

Can it be supposed that the United States would surrender a "fugitive criminal" to Great Britain, and while he was there awaiting trial, at large on bail, he assassinated the King of England, that this government through its political representatives, would demand the return of such criminal, and require new extradition proceedings? I do not believe so.

On the other hand, can it be supposed that if a " fugitive criminal" had been extradited to the United States, and that while he was here awaiting trial, at large on bail, he assassinated our

President, that this Court would release him on *habeas corpus,* because he had not yet been tried for the extradition crime? I do not believe so.

As soon as Collins was indicted for the *subsequent* perjury the State of California had the immediate right to cause his arrest therefor, and if needs be dismiss the indictment for the extradition crime, and proceed with his trial upon the second indictment. No violation of any treaty or legislative rights would be committed by so doing. The State of California had jurisdiction of his person when he was delivered under the extradition warrant, and, when the second indictment was found, and he was arrested thereon, it had the right to elect upon which indictment it would then proceed. In this instance the state exercised such right by electing to postpone the second trial for the "extradition crime" until after the conclusion of the trial on the second indictment for the subsequent perjury.

It is immaterial that the second felony was a perjury committed by him as a witness in his own behalf on a perjury charge. Collins was not required to testify, but if he did, the law presumed that he would tell the truth, which presumption, in the present instance, received a violent shock. If he had been extradited for larceny or embezzlement, and on his trial had testified falsely as to a material matter, he could and would have been prosecuted for such perjury. The fact that he tes-

tified voluntarily in his own behalf, instead of testifying under compulsion, in no degree affects the legal doctrines applicable to the case.

An examination of the legislative enactments of Great Britain passed in relation to the treaty, show a system of procedure for the demanded "fugitive " criminal" in relation to the specified offense, and as to his subsequent treatment in relation to *prior offenses,* but in no way do they limit his treatment as to any subsequent offense.

The reason for the enactment by Great Britain, heretofore referred to, of the act specifically mentioning *prior offenses,* and of article III of the supplemental treaty incorporating a like specification is apparent. Questions had arisen, in several jurisdictions of the United States, under the tenth article of the treaty of 1842, which made no mention of prior offenses, and the judicial determinations, as I have pointed out, were not uniform.

Some of the courts, including this Court in the *Rauscher Case* holding that, *by implication* the " fugitive" was not to be prosecuted for any *prior* or other offense, and others holding that there was no such implication. In other words, the question was not determined by the terms of the treaty itself, but was subject to varying construction and interpretation by different judicial bodies.

Therefore, when in 1889, it became expedient to reform article ten of the treaty of 1842, by reason of other deficiencies which had been discovered,

in putting the same into operation, and for adding certain other offenses, it was determined to make the "supplemental treaty" *complete and express* in relation to all matters within the "manifest scope "and object" thereof. Accordingly an express limitation was incorporated therein as to *prior offenses,* and no intention manifested that *subsequent offenses* were to be included therein *by implication.* In fact the purpose was to *express* everything and to leave *nothing to be implied* by judicial construction. And by reason thereof the legal maxim of construction, *"expressio unius est exclusio alterius,"* applies.

There never could be an implication as to any *subsequent* offense, by reason of any previous custom or judicial determination. A construction granting immunity from prosecution as to any subsequent offense should not be indulged, *unless the most explicit language of the treaty requires,* and there is no such explicit language in the treaty. On the contrary the entire history of the treaties and legislation in relation thereto, and the "manifest "scope and object" thereof manifestly lead to the construction and interpretation that no intention existed to prescribe any limitations in respect to any crime which had not then been committed. The treaty dealt with the "fugitive" who was *then* a criminal, and did not deal with him in the light of *becoming a "fugitive"* for some offense which he *might* commit in the future.

If any protection can be *implied* as to a subse-

quent offense, then the doctrine of the forfeiture of such right should be applied, by reason of a subsequent breach of the peace, while under rendition. By analogy it would correspond to certain articles of war where the "Flag of Truce" clothes the bearer thereof from harm as long as he commits no breach while under its protection. Directly he ignores the conditions guaranteed him as a bearer thereof, he is deprived of its protection, and subject to summary punishment for a violation of its privileges. So here, if Collins ever had protection under the "Extradition Warrant", immediately he committed a subsequent breach of the peace of the laws of California he forfeited the right to any protection from Canada or Great Britain by reason of his treaty rights under his extradition.

Collins had no Right to demand asylum for his subsequent perjury.

When Collins became a "fugitive criminal" on the bigamy charge no right existed in him to demand from Canada and insist upon security and be given asylum in Canada therefor. That government could upon demand have ignored the provisions of the treaty, and if he had been voluntarily surrendered for such non-extraditable offense, and brought to California, the trial on the bigamy charge could and would have continued, irrespective of the provisions of the treaty. Our courts

do not concern themselves with any failure on the part of the surrendering country to comply with every procedure and incident prescribed by the treaty in relation to the fugitive, antecedent to his surrender. Our courts will only concern themselves with the treatment of the demanded fugitive *after* surrender on the "extradition warrant." And even if the extradition laws of Canada had provided (which we have heretofore shown they did not) that a warrant for extradition should not issue for any person to any state or country in which, by the law in force in such state or country, such extradition for any other offense than that for which he has been extradited, unless an assurance shall have been first given by the executive authority of such state or country that the person whose extradition has been claimed shall not be tried for any other offense than that on account of which such extradition has been claimed, and the Canadian Government had failed or neglected to obtain such "an assurance", such omission would not be subject to any consideration by our courts in dealing with the custody of the person after a surrender.

Likewise as to Collins being a "fugitive crim-" inal" on the indictment for perjury for which he was extradited. Any omission by the Canadian authorities in procuring "an assurance", if any was necessary, is a matter which is entirely immaterial in this proceeding.

If Collins had no **right** to demand an asylum in Canada for offenses which he had already committed, *a fortiore,* he had no prospective right to demand such asylum or security in relation to any other crime which he subsequently might, or intended, to commit in California. As to the subsequent offense which he did commit, he never became a fugitive to Canada. He committed the offense in the California jurisdiction and never departed therefrom. Nor does the treaty direct that such jurisdiction by California over his person should be temporarily surrendered, and he be allowed to depart, and seek a new asylum and domicile, either in Canada, Honduras, or any other foreign country.

In *U. S.* v. *Rauscher,* 119 U. S. at page 411, it is said:

> "It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion

of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law."

In the case of *Ker* v. *Illinois*, 119 U. S. 436, (which was a case where the person had been kidnapped from Peru, without extradition proceedings), the Court says, at pages 441 and 442 and 444:

> "But the main proposition insisted on by counsel for plaintiff in error in this court is, that by virtue of the treaty of extradition with Peru the defendant acquired by his residence in that country a right of asylum, a right to be free from molestation for the crime committed in Illinois, a positive right in him that he should only be forcibly removed from Peru to the State of Illinois in accordance with the provisions of the treaty, and that this right is one which he can assert in the courts of the United States in all cases, whether the removal took place under proceedings sanctioned by the treaty, or under proceedings which were in total disregard of that treaty, amounting to an unlawful and unauthorized kidnapping.
>
> "This view of the subject is presented in various forms and repeated in various shapes, in the argument of counsel. The fact that this question was raised in the Supreme Court of Illinois may be said to confer jurisdiction on this court, because, in making this claim, the defendant asserted a right under a treaty of

the United States, and, whether the assertion was well founded or not, this court has jurisdition to decide it; and we proceed to inquire into it.

"There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum?

"Nor can it be doubted that the government of Peru could of its own accord, without any demand from the United States have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this. The right of the government of Peru voluntarily to give a party in Ker's condition an asylum in that country, is quite a different thing from the

right in him to demand and insist upon security in such an asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in the case of one who is proved to be a criminal fleeing from justice, so that, on proper demand and proceedings had therein, the government of the country of the asylum shall deliver him up to the country where the crime was committed. And to this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom.

"In the case before us, the plea shows, that, although Julian went to Peru with the necessary papers to procure the extradition of Ker under the treaty, those papers remained in his pocket and were never brought to light in Peru; that no steps were taken under them; and that Julian, in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States."

"In the case of *United States* v. *Rauscher*, just decided, *ante*, 407, and considered with this, the effect of extradition proceedings un-

der a treaty was very fully considered, and it was there held, that, when a party was duly surrendered, by proper proceedings, under the treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed, both in regard to himself and in good faith to the country which had sent him here, was, that he should be tried for no other offence than the one for which he was delivered under the extradition proceedings. If Ker had been brought to this country by proceedings under the treaty of 1870-74 with Peru, it seems probable, from the statement of the case in the record, that he might have successfully pleaded that he was extradited for larceny, and convicted by the verdict of a jury of embezzlement; for the statement in the plea is, that the demand made by the President of the United States, if it had been put in operation, was for an extradition for larceny, although some forms of embezzlement are mentioned in the treaty as subjects of extradition. But it is quite a different case when the plaintiff in error comes to this country in the manner in which he was brought here, clothed with no rights which a proceeding under the treaty could have given him, and no duty which this country owes to Peru or to him under the treaty.

"However this may be, the decision of that question is as much within the province of the State court, as a question of common law, or

be, construed as having any reference to a case where the extradited "fugitive", *while awaiting trial, committed another offense.*

Beginning at page 35 of his brief he contends that he is entitled to his discharge, because he has not been brought to trial "within a reasonable "time", for the extradition crime, and, if not, that jurisdiction over his person ceases. He contends that "what is a reasonable time will usually be de- "termined by analogy, to the *lex fori,* in this case "California"; and that sixty days is a reasonable time under that law, and cites *Ex parte Begerow,* 133 Cal. 349, as an authority demanding his release by this Court. He was brought to trial as soon as possible after his extradition, but that trial ended in a disagreement of the jury. He was indicted for a subsequent offense and convicted. He applied to the District Court of Appeal, and to the Supreme Court, of California, claiming his right to his discharge on *habeas corpus,* because his second trial was not proceeded with in sixty days after his mistrial. In those proceedings the District Attorney (as was his right under the California law) showed cause, satisfactory to those courts, why his second trial had been postponed. The judgments of those courts are final upon that question, and the decision thereof did not involve any international treaty rights, or any federal question; the determinations were the construction of a constitutional state law, and are not subject to

his "specification of errors", but on the final analysis it is in substance as just quoted, and that, in reality is the *sole question* to be reviewed by this Court on this writ of error.

In his brief he extensively quotes from text writers, such as Wheaton, Heffter, Fiore, Billot, Twiss, Andrews, Hawley, Moore, Clarke, Spear and "Foreign Relations of U. S.", and numerous decisions by various state and federal courts. All of this is very interesting reading, and is referred to, and set forth, in the first part of this brief, but all of those references treat with the "extradition "offense" alone, and with *prior offenses;* they in no wise controvert any contention in relation to *subsequent offenses,* with the exception of Spear on Extradition on page 84, where he concisely and positively asserts that the *subsequent offense* is not in any manner restricted by the treaty, or by the extradition warrant. And because that learned author dares to state such a legal doctrine, the plaintiff in error, through several pages of his brief, beginning at page 100 thereof, proceeds to administer to him a most caustic written castigation for such offense.

His repeated references to the language of those authors and judges, where they say that the "fugi- "tive" is not to be "arrested or tried for any other "or different offense", are misleading. Such language, as used by them, must be considered with the text and the *facts under discussion.*

They were not intended to be, nor should they

SECOND PART.

Answer to the Brief and Argument by Plaintiff in Error.

The plaintiff in error is an attorney, and has prepared his own brief, and the main theme thereof, often repeated, seems to be an imaginary "federal custody", the interference with which seems to him almost sacrilegious.

He succinctly states this contention in italicized language at page 11 of his brief as follows:

> "It is the well settled doctrine of the law that an extradition treaty is in its essential nature, simply a limitation for a special purpose, of the right of asylum; and that as against every trial, and every prosecution not authorized by the particular extradition, the asylum obtained by the accused, still persists and still continues, thus making the extradition jurisdiction in the case where it exists, supreme and exclusive over the person of the accused, and prohibiting the exercise of any other jurisdiction over him, upon any other and different charge than the one upon which his extradition was granted."

This is a *petitio principii,* as it assumes what is not granted, by the treaty, or by any judicial construction thereof, that the warrant of extradition grants an asylum, and vests jurisdiction exclusive of any other, in relation to any other *subsequent offense.*

This contention is, in various forms, repeated in

> of the law of nations, of which that court is bound to take notice, as it is of the courts of the United States. And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision."

Therefore, as to his *subsequent offense* of perjury, Collins is within the jurisdiction of California, and subject to prosecution and punishment therefor, under her laws, as though he were here voluntarily, and he is without any protection in relation thereto under any treaty, and as though he had never been surrendered by extradition warrant for another and previous offense against her laws.

His custody by the Sheriff temporarily, until delivered to the State Prison, in execution of the judgment pronounced against him, is not illegal, nor in violation of any provision of the Constitution of the United States, nor of section 5275 of the U. S. Revised Statutes, nor of any treaty between the United States and Great Britain. And as soon as this court affirms the order of the California Supreme Court, brought here for review by this writ of error, and also affirms the order of the United States Circuit Court, brought here for review by his appeal, the legal conviction and judgment pronounced thereon against him, will be executed.

review by this Court either on the appeal, or on this writ of error.

Although the brief of appellant in error is about two hundred pages, what I have heretofore referred to in substance covers the entire matter, with one exception and that is his impertinent and uncalled for attack (comprising several pages of his brief beginning at page 59 thereof) upon the integrity and honesty of our several state and federal judges and justices who have been compelled to listen to his diatribes, and pass upon the merits of his varied and erroneous contentions.

He attempts, in such portions of his brief, to pose before this Court as an "injured innocent", and as being the victim of an unwarranted, manufactured and malicious persecution, instigated by certain imaginary and unnamed people of wealth in our community. He then practically accuses every judge and justice who has been called upon to pass upon any question involved in his cases, as being concerned and interested in such criminal conspiracy. The very statement of such a proposition merits a severe censure and reprimand by this Court, in justice to those men of high character, who have thus been cowardly attacked, without personal opportunity of refutation of his malignant and malicious slanders.

I deem, therefore, in view of his attitude, that this Court should, by means of a condensed statement, be acquainted with the true conditions and circumstances.

When Collins was placed upon trial for bigamy the judge of our Superior Court (having been accused by Collins of bias and prejudice), called in Judge T. J. Lennon of Marin County to preside, against whom at that time he made no objection.

After his extradition for perjury, the trial judge of our Superior Court, again called in Judge Lennon to try that cause.

And Judge Albert G. Burnett of Sonoma County (who has since been elected a Judge of one of our District Courts of Appeal), was called in for the trial upon which he was convicted, against whom at that time he made no objections.

After his conviction and sentence, either on appeal or on *habeas corpus,* about fifteen judges of our Superior Court, four judges of our District Court of Appeal, seven Justices of our State Supreme Court, and Judges De Haven, Wolverton, Van Fleet and Morrow of our United States District and Circuit Courts have passed upon his case, and, uniformly, adversely to his contentions.

And now he contemptuously impugns the honesty, fairness and integrity of all of them. It is disgraceful that our procedure makes it possible for a brief to contain such villainous and false stuff.

Again, at page 61 of his brief, and at other places, apparently apologetically, he says that "though the subject is one that he is not allowed "to discuss in this case", yet he proceeds to therein

set forth what he claims to have been evidence on his trial, or lack of evidence.

He fails to state the numerous other perjuries committed by him upon his trial, other than the ones for which he was indicted, as disclosed by the record.

He fails to call attention to the fact that this record shows absolute falsehoods, when, in his application for his writs of *habeas corpus*, he stated that the second perjury charged was "**committed prior**" to his extradition.

He fails to call attention to the fact, as shown in this record, that he stated, in his application to the State Supreme Court for this writ of *habeas corpus*, now here for review, that certain matters were contained in the "Extradition Warrant", (believing at that time that as the original warrant had been destroyed in the San Francisco fire of April 18th, 1906, that legal evidence would not be obtainable to contradict the same), and that our Supreme Court in its opinion states that, under the evidence, such statement is untrue.

He fails to state that in the case where he was convicted (as clearly stated by Hiram W. Johnson, Esq., in the brief in the appeal of Collins in our State Appellate Court,) that

"The record conclusively establishes that he had a fair trial, and that he was accorded greater latitude than the law really gives him. The evidence was so overwhelming that no jury could have done

otherwise than convict him. Every living witness to the marriage of defendant, and every document in existence and every circumstance surrounding the parties, conclusively demonstrate guilt. We may add to all of the living witnesses and all of the marriage records that were preserved, his own remarkable story as contributing to the result.

And now, in conclusion and in answer to the remarks of the defendant respecting his conviction, we simply tabulate the names of the witnesses who in every material matter contradict the defendant and prove that he married May 15, 1889, Charlotta E. Newman. No realistic novel of Emile Zola ever portrayed a life so at variance with every moral teaching as the evidence in this case discloses the life of the defendant to have been. To advert in detail to the infamy established in this case would be inappropriate in a legal brief. Suffice it to say that at the time of the trial, of those who were present at the marriage of defendant on the 15th of May, 1889, there were living seven people, to-wit: Father Connolly, Henry Newman, Florence Newman, William Newman, Thomas E. Curran, George D. Collins and Charlotta E. Collins. The last named was not permitted to testify, because she was the wife of the defendant. All of the others, with the exception of Collins, including the man selected by the defendant himself as a witness to the ceremony, testified that the defendant married Charlotta E. Newman. The records

that were preserved and that established this marriage conclusively, and likewise established conclusively the perjury of the defendant, are the following:

1. The marriage license.

2. The affidavit to the marriage license signed by the defendant himself.

3. The church record of St. John's Parish, containing the entry of the marriage.

4. The certificate of the officiating priest at the marriage.

5. The memorial of marriage given to the bride by the priest.

6. The indorsement upon the marriage license in the handwriting of defendant.

7. Lastly, the wedding ring of Charlotta Collins.

It will be observed further that on every occasion when the two women were together and the question of their relationship was broached, invariably Charlotta was designated by the defendant as his wife. This fact is established conclusively by Dr. G. P. Reynolds, Dr. Adolph Kahn, Miss Kate Creedon, Dr. Nathan Rogers, Dr. S. F. Long, Mrs. A. M. Zuboff and Mrs. Josephine Angele. The testimony of the defendant is pitiful in its makeshifts and revolting in its perjuries.

His conviction was a just one. The facts demanded it; and the law upholds it."

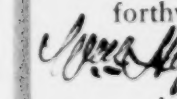
I should not have made any of these references

had not the plaintiff in error inexcusably resorted to calumnies and misrepresentations for the evident purpose of trying to provoke in this Court an unmerited and false sympathy, as to the merits of his case, beyond the technical legal rights otherwise contended for by him herein.

Throughout my entire connection with the various phases of his case (now in California, perhaps, a *cause celebre*), I have acted absolutely impersonally, and simply in an honest and sincere discharge of my official duties, and I am now representing the State of California at the request of Hon. W. H. Langdon, our District Attorney, and of Hon. U. S. Webb, Attorney General of our State.

Collins himself, to my mind, is an able lawyer, but to be criticized in the practice of his profession, by reason of his concealment of facts, and constant misstatement of facts and law. However, as disclosed by the record in his cases he is a moral pervert, and is a confirmed victim of abhorrence of the truth.

It is respectfully submitted that the order of the Supreme Court of California should be affirmed, and the mandate of this Court of affirmance issue forthwith.



WM. HOFF COOK,

Assistant District Attorney of San Francisco,

Counsel for Defendants in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 320.

GEORGE D. COLLINS, APPELLANT,

vs.

THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED MARCH 16, 1908.

(21,070.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 23, 1908.

1 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

In the Matter of the Application of GEORGE D. COLLINS for the Writ of *Habeas Corpus*.

Complaint.

To the Honorable the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California:

Comes now George D. Collins and files and presents this his Complaint to your Honorable Court and alleges that he is illegally imprisoned and unlawfully restrained of his liberty by Thomas F. O'Neil, Esq., the sheriff of the City and County of San Francisco, State of California, and in the County Jail situate in the said City and County. That said imprisonment is unlawful and illegal in this: That the same is exclusively under a two fold claim of authority void in law, to wit: 1. By virtue of a certain warrant of surrender and of extradition issued and directed to one Thomas Gibson by the Government of Great Britain, in the extradition proceedings hereinafter referred to, and commanding said Gibson to receive from the said Government of Great Britain and take the custody of the said George D. Collins and convey him to the United States for the purpose of his being brought to trial upon a certain criminal indictment and charge to wit: the charge of perjury therein in said indictment alleged to have been committed by the said George D. Collins in said City and County of San Francisco on the 30 day of June, 1905, the said warrant of surrender and extradition in terms requiring the said Gibson to convey said Collins from Canada

2 to the United States and there deliver him to such person as may be named and designated by the United States to receive the said Collins. That the United States has never appointed nor designated the said Thomas F. O'Neil, nor any other person to receive the said Collins from said Gibson nor authorized nor directed said Gibson to deliver or surrender said Collins to said Thomas F. O'Neil, nor to the sheriff of said City and County of San Francisco. That the said warrant does not name, designate nor specify any person to take the custody of nor to receive the said Collins other than said Gibson. That your petitioner without his consent and against his will, and without the consent of the United States or of Great Britain was removed from the custody of said Gibson by the State of California and thereupon by said State of California, was placed in the said custody of said sheriff and has ever since been and is now in the custody of said sheriff. That the said warrant does not run to the said O'Neil either as sheriff or individually nor in any manner refer to him. That said O'Neil is not and never was the agent nor representative of said Gibson and is not acting in the matter of said imprisonment as the agent or representative of said Gibson; nor is said imprisonment by said Gibson, nor by his direc-

tion nor authority. That a copy of the extradition warrant under which said sheriff claims the right to imprison your petitioner is hereto annexed and marked "Exhibit A" and is hereby specially referred to and made a part hereof. That said warrant still remains in full force and effect. 2. That said imprisonment is also by virtue of the void judgment of the Superior Court of the State of California in and for the City and County of San Francisco in a case there pending, wherein the People of the State of California are plaintiffs and said George D. Collins is defendant and in which case by a certain indictment filed in said Superior Court on the 29th day of December, 1905, and during the pendency of the said extradition
3 case, the said defendant is accused of having committed perjury on the 12th day of December, 1905, in testifying as a witness in his own behalf on the trial of said extradition case in said Superior Court and concerning the truth of the very matters involved in the charge of perjury contained in the said indictment in said extradition case and constituting the principal issue therein. That the said indictment on which said warrant of surrender and extradition was obtained by and granted to the United States was filed in said Superior Court on the 13th day of July, 1905, and charges said Collins with having committed perjury on the 30th day of June, 1905. That said indictment of December 29, 1905, is not embraced nor included within the said extradition proceedings. That said indictment and charge of July 13th, 1905, were pursuant to said extradition brought to trial before said Superior Court and a jury regularly impaneled and sworn to try the same, with the result that said jury were unable to agree upon a verdict and for that reason the said Superior Court discharged them on the 22nd day of December, 1905, and the further trial of said action has ever since been continually and repeatedly postponed by said Superior Court upon motion of the State of California, and each time against the objection and exception of this petitioner, the defendant therein, and said action has never been brought to trial since the said disagreement of said jury and never has been dismissed nor otherwise disposed of. That instead of bringing said extradition case to a trial to a final conclusion, the People of the State of California against the objection, protest and exception of petitioner, brought to trial and judgment of conviction the said second charge of perjury to wit: said second charge of December 29th, 1905, and on March 10th, 1906, said Superior Court adjudged him to be imprisoned on said conviction in the penitentiary of said State of California for the
term of fourteen years, and ordered him into the custody of
4 said sheriff to be held pending the arrival of the time for the execution of said judgment in due course of law. That said judgment of conviction is final and has been affirmed upon appeal. That the said judgment is the judgment above referred to, under which said sheriff also imprisons your petitioner, in conjunction with said warrant of extradition, the latter not purporting to confer any authority whatever upon said sheriff. That the said judgment of said Superior Court and said imprisonment thereunder are illegal and void in this: That on the 7th day of July A. D. 1905, and thence continuously unto the time of his extradition and surrender here-

inafter averred to wit: on the 15th day of October, 1905, your petitioner was a resident and inhabitant of and domiciled in the City of Victoria in the Province of British Columbia, Dominion of Canada and while he was such resident and inhabitant and so domiciled, he was on to wit: the said 16th day of October, 1905, upon the demand, requisition and application of the United States and solely under and pursuant to and by virtue of the Treaty of Extradition existing between the United States and Great Britain, and exclusively upon said extradition warrant, surrendered, removed, and extradited from said City of Victoria, to the United States and to San Francisco in the State of California for trial to a final conclusion on the said charge on which said extradition was granted, to wit: the specific charge of perjury set forth in said indictment of July 13, 1905. That the said extradition was then and there granted, permitted and ordered by Great Britain in favor of the United States and upon request of the United States, exclusively upon said indictment filed in said Superior Court on July 13th, 1905, and on the said specific charge of perjury therein contained and on no other charge, and on condition that your petitioner should be brought to trial in regular and due course of law only upon said charge on which said extradition was granted as aforesaid and should not be brought to trial upon any other charge or any other indictment until after the trial to a final conclusion of said extradition charge, and until after the expiration of the time specified in section 5275 of the Revised Statutes of the United States. That the United States accepted and received from Great Britain, the custody and surrender of your petitioner upon said condition,—and on said extradition warrant; and thereafter and in execution of said Treaty and on the 27th day of November, 1905, brought your petitioner before said Superior Court for trial on said indictment and charge of July 13th, 1905, and after a trial thereof accordingly by said Superior Court and a jury regularly impaneled and sworn, the jury were unable to agree upon a verdict and were by said Superior Court ordered discharged and they were accordingly, on the 22nd day of December, 1905, discharged, and said Superior Court thereupon on motion of the State of California and without the consent of your petitioner indefinitely postponed the further trial of said extradition charge. That said extradition case is still pending in said Superior Court and has never at any time since the said discharge of said jury, been placed on trial, and is still awaiting trial to a final conclusion in said Superior Court. That your petitioner is unable to obtain a trial of said extradition case, and said Superior Court on motion of said State of California refuses to give him a trial thereof.

That notwithstanding the pendency of said extradition case, awaiting trial to a final conclusion in said Superior Court the People of the State of California filed against your petitioner on the 29th day of December, 1905, in said Superior Court, another and altogether different charge of perjury alleged to have been committed by your petitioner and which was committed if at all prior to the said extradition to wit: prior to the termination of said extradition and of said

extradition case and is for an alleged offence not specified nor
6 included nor embraced in said extradition proceedings nor in the extradition process, nor in said extradition warrant. That thereupon the People of the State of California, and against the objection, protest and exception of your petitioner, and while said extradition warrant remained in full force and effect, and while your petitioner was subject thereto, pressed to trial and to said judgment in said Superior Court, the said second indictment, to the exclusion of and superseding said extradition case and thereby excluding and superseding said charge of perjury included and specified in the said extradition process, and abandoned the said extradition case and the further prosecution thereof. That your petitioner at the very inception of said proceedings and prosecution in the matter of said second indictment and at every stage of said second prosecution, appeared before said Superior Court and proved the pendency therein of said extradition case awaiting said trial of said extradition charge to a final conclusion, and on that ground objected each time and on each occasion to said Superior Court proceeding in said second case and on said second indictment and before said Superior Court applied and moved for the postponement of all prosecution and of the trial and of all proceedings on said second indictment until after the trial to a final conclusion of said extradition case; and in and before said Superior Court specified in all of his said objections that any prosecution of or proceedings in the matter of said second indictment while the said extradition case was pending and awaiting trial to a final conclusion in said Superior Court, were in contravention and violation of said extradition proceedings and of said extradition warrant and of the Treaty of Extradition between the United States and Great Britain and of international law and of said extradition and of the provisions of section 5275 of the Revised Statutes of the United States and deprived him of his liberty without due process of law, in violation of the first section of the Fourteenth Amendment of the
7 Constitution of the United States. That each and all of said objections and said motion were overruled and disallowed by said Superior Court and to each of said rulings your petitioner duly and regularly took and reserved his exception. That said sheriff does not hold or detain your petitioner in his custody by any other warrant, process or authority than said judgment and said warrant of extradition.

Your petitioner avers that said judgment of said Superior Court and said imprisonment thereunder are null and void and in violation of said extradition proceedings and of said extradition warrant and of the said Extradition Treaty and of international law and of the provisions of section 5275 of the Revised Statutes of the United States and of Section one of the Fourteenth Amendment of the Constitution of the United States and your petitioner is deprived of his liberty without due process of law. That your petitioner's imprisonment by said sheriff, under said warrant of extradition is without authority of said warrant and without authority in law and there is no writ or process or warrant or authority for said imprisonment. That said sheriff does not hold or detain your petitioner in custody in said extradition case by virtue of any process, warrant or authority other

than said warrant of extradition. That upon all the matters pleaded in this complaint, your petitioner applied to the Supreme Court of said State of California for the Writ of *Habeas Corpus* and on the 9th day of December, 1907, the said Supreme Court denied the Writ and refused to issue the same; holding and deciding that said matters were and are insufficient to justify the issuance of the Writ of *Habeas Corpus*.

Wherefore your petitioner prays that your Honorable Court grant him the Writ of *Habeas Corpus* directed to said Thomas F. O'Neil, the sheriff of said City and County of San Francisco and returnable before your Honorable Court at a time and place designated.

8 That upon the return of the Writ and after hearing the case, it be adjudged by your Honorable Court that the said imprisonment is unlawful. That your petitioner be by your Honorable Court adjudged entitled to his liberty and ordered discharged and released from the said imprisonment upon the ground that said imprisonment is in violation of the Constitution, Treaty and laws of the United States.

GEORGE D. COLLINS, *Petitioner.*

UNITED STATES OF AMERICA,
Northern District of California, ss:

George D. Collins being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated upon his information or belief; that as to those matters he believes it to be true.

GEORGE D. COLLINS.

Subscribed and sworn to before me this 23rd day of December, 1907.

[SEAL.] J. A. SCHAERTZER,
Deputy Clerk U. S. Circuit Court,
Northern District of California.

9 "EXHIBIT A."

Warrant under the Extradition Act to the Sheriff of the County of Victoria, B. C., the Keeper of the Common Gaol at the City of Victoria, B. C., and to Thomas B. Gibson, re George D. Collins, Dated 16th October, 1905; Recorded 16th October, 1905—Joseph Pope, Dep. Registrar General of Canada.

[OFFICIAL SEAL.]

Canada.

To the Sheriff of the County of Victoria and the Province of British Columbia, to the Keeper of the Common Gaol at the City of Victoria, in the said County, and Thomas B. Gibson:

Whereas George D. Collins, accused of the crime of perjury committed within the jurisdiction of the United States of America, was

delivered into the custody of you, the said Keeper of the Common Gaol at Victoria, aforesaid, by warrant of his Honor, Peter Secord Lampman, a Judge under the "Extradition Act," dated the nineteenth day of August, in the year of our Lord, one thousand nine hundred and five, pursuant to the said "The Extradition Act" there to await the surrender to the said United States of America.

Now, I do hereby, in pursuance of the said Act, order you the said sheriff, and you, the said Keeper of the Common Gaol, to deliver the said George D. Collins into the custody of the said Thomas B. Gibson, and I command you, the said Thomas B. Gibson to receive the said George D. Collins into your custody, and to convey him within the jurisdiction of the said United States of America, and there place him in the custody of any person or persons appointed by the said United States of America to receive him.

For which this shall be your warrant.

Given under the hand and seal of the undersigned Minister of Justice of Canada, this sixteenth day of October, in the year of our Lord one thousand nine hundred and five.

(Signed) C. FITZPATRICK,
[L. S.] *Minister of Justice.*

(Endorsed:) No. 14629. In the Circuit Court of the United States Ninth Judicial Circuit Northern District of California. In the Matter of the Application of George D. Collins for the Writ of *Habeas Corpus*. Complaint for writ of *habeas corpus*. Filed December 23, 1907, Southard Hoffman, Clerk. By J. A. Schaertzer Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

In the Matter of the Application of GEORGE D. COLLINS for a Writ of *Habeas Corpus*.

Answer and Return on Order to Show Cause Why Writ of Habeas Corpus Should Not Issue.

Now comes Thos. F. O'Neil, the Sheriff of the City and County of San Francisco, by and through Wm. Hoff Cook, as an Assistant District Attorney of said City and County, and for answer to the complaint of George D. Collins herein, and as an answer and return to the order to show cause herein why a writ of *habeas corpus* should not issue, alleges, avers, shows and denies as follows:

In respect to the complaint herein this respondent denies that said George D. Collins is illegally imprisoned or unlawfully restrained from his liberty by Thos. F. O'Neil, the Sheriff of the City and County of San Francisco, State of California, at any place.

Denies that the imprisonment of said Collins is unlawful or illegal or that the same is exclusively under a two-fold claim of

authority void in law, to-wit: 1. "By virtue of a certain warrant of surrender and extradition issued and directed to one Thomas Gibson by the Governor of Great Britain, a copy of which is marked 'Exhibit A' to said complaint."

Denies that the United States never appointed or designated any person to receive said Collins from said Gibson, or authorized or directed said Gibson to deliver or surrender said Collins to the Sheriff of the City and County of San Francisco.

12 Denies that said Collins without his consent, or against his will, or without the consent of the United States, or of Great Britain was removed from the custody of said Gibson by the State of California, or by said State of California was placed in the custody of the Sheriff of the City and County of San Francisco.

Denies that said imprisonment is by virtue of any void judgment of the Superior Court of the State of California, in and for the City and County of San Francisco, in a case there pending, wherein the People of the State of California are plaintiffs and said George D. Collins is defendant.

Denies that a second or further trial of the charge contained in the indictment filed July 13, 1905, and referred to in said complaint has been postponed each time against the objection and exception of the petitioner herein, the defendant therein, and alleges that the original records in said cause were destroyed by the fire of April 18, 1906, and that it was impossible at once to restore the records thereof, nor were they actually restored until about the month of August, 1907, and it was impossible to have a further or second trial of said cause until such records were restored. That since the restoration of said records, the defendant has had an opportunity to have a date fixed for a further or second trial of said cause, but has refused to select such date, although requested so to do.

Denies that said Collins was a resident or inhabitant of or domiciled in the City of Victoria in the Province of British Columbia in the Dominion of Canada, on October 16, 1905, but alleges at said time he was a fugitive from justice from the State of California.

Denies that said Collins was extradited upon the condition that he should not be brought to trial upon any other charge or any other indictment until after the trial to a final conclusion of the said extradition charge referred to in said complaint, or until

13 after the expiration of the time specified in Section 5275 of the Revised Statutes of the United States, and denies that the United States accepted or received from Great Britain the custody or surrender of said Collins upon said condition on said extradition warrant.

Denies that said Collins is unable to obtain a further and second trial of said extradition case in said Superior Court, or that said Superior Court refuses to give him a further or second trial thereof.

Denies that the perjury charged in the indictment referred to in said complaint as having been filed on December 29, 1905, was committed by said Collins prior to the extradition referred to in his said complaint.

Denies that the Sheriff of the City and County of San Francisco

does not hold or retain the petitioner Collins in his custody by any other warrant, process or authority than said judgment and said warrant of extradition.

Denies that the judgment of said Superior Court and imprisonment thereunder referred to in the complaint of the petitioner herein are null or void or in violation of any extradition proceedings, or of ex-national law or of the provisions of Section 5275 of the Revised Statutes of the United States or of Section 1 of the Fourteenth Amendment of the Constitution of the United States upon that said Collins is deprived of his liberty without due process of law.

Denies that said Sheriff does not hold or detain said Collins in custody in said extradition case by virtue of any process, warrant or authority *over* than said warrant of extradition.

And respondent further alleges that the petitioner Collins heretofor- applied for a writ of *habeas corpus* to this Court upon the same grounds now set forth in his complaint herein, which said petition after full hearing and argument was denied, and said cause numbered 14274 in the records of this Court to which proceedings

14 reference is hereby made, and all the records, papers and files in said cause, numbered 14274 in this Court are hereby specially referred to and made a part of this return and answer.

And this respondent further alleges that in May, 1907, the petitioner Collins applied to the Supreme Court of the State of California for a writ of *habeas corpus*, involving all the matters contained in his complaint herein, and said *cause* issued a writ of *habeas corpus* upon his petition therein, and after hearing testimony and full argument upon said writ on May 21, 1907, said Court made its order denying said petition and remanding said Collins to the custody of the Sheriff of the City and County of San Francisco under and by virtue of the two indictments referred to in petitioner's complaint herein, and the proceedings had thereon. That in said cause, after such remand, the petitioner Collins filed in said Court on May 27, 1907, his petition for a writ of error in the United States Supreme Court to have such proceedings and order of remand reviewed, and on June 12, 1907, Chief Justice of the Supreme Court of the State of California allowed said Collins a writ of error as prayed for by him for the purpose of having the United States Supreme Court pass upon the question involved in said proceeding, which same questions are now presented in his complaint herein.

That such writ of error was duly sued out and allowed and filed with the Clerk of said Supreme Court on November 8, 1907, and on the same date said Collins filed his bond on such writ of error, and deposited and filed with the Clerk of said Court, his assignment of errors on said writ, and lodged a copy of said writ of error with the Clerk of said Court; and on December 31, 1907, said Collins procured from the Clerk of said Court a certified copy of the record of said proceedings for the purpose of having said cause heard in said United States Supreme Court. That said writ of error fixed January 7, 1908, as the return day thereon.

15 And respondent further makes all the papers hereunto annexed and presented by E. J. Kirwan, Deputy Sheriff a part of this return and answer.

Wherefore respondent prays that the application and petition of said Collins for a writ of *habeas corpus* herein be denied.

WM. HOFF COOK,
Assistant District Attorney.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Wm. Hoff Cook being first duly sworn, says that he is a duly appointed, qualified and acting Assistant District Attorney of the City and County of San Francisco, State of California; that he has heard read the foregoing answer and return, and knows the contents thereof and that the same is true to the best of his information and belief.

WM. HOFF COOK.

Subscribed and sworn to before me this 3rd day of January, 1908.
[SEAL.] J. J. KERRIGAN,
Notary Public in and for the City and County of San Francisco, State of California.

16 Office of the Sheriff of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
GEORGE D. COLLINS, Defendant.

DECEMBER 27TH, 1907.

I, Hereby certify that I received the annexed Order to Show Cause on the 27th, day of December A. D. 1907, and in obedience to the Order contained therein I now produce the body of George D. Collins the therein named before the Hon. United States Circuit Court, Ninth Judicial Circuit, in and for the Northern District of California Hon. John J. De Haven, District Judge, and I further certify that I hold the within named George D. Collins under and by virtue of the following process, viz: a Certificate of Probable Cause, issued out of the Hon. Superior Court, of the City and County of San Francisco, State of California, Dept. No. 11, Hon. Albert G. Burnett Judge, A Warrant of Extradition Issued by Hon. Peter Secord Lampman in the County of Victoria, Province of British Columbia, and certified to by J. Pope, Deputy Register General of the Dominion of Canada, An Order of the Hon. Supreme Court, of the State of California, Hon. W. H. Beatty Chief Justice. A Superior Court Commitment issued out of the Hon. Superior Court, Department, No. 11 Hon. Albert G. Burnett Judge, Two (2) Bench Warrants issued out of the Hon. Superior Court, Dept. No. 11, Hon. William P. Lawlor Judge, and a Writ of Error and Supersedeas issued out of the Hon. Supreme Court of the State of California, Hon. W. H. Beatty Chief Justice, copies of said Certificate of Probable Cause and said
17 Extradition Warrant, and said Bench Warrants, and said Supreme Court Order, and Said Superior Court Commitment

and said Writ of Error and Supersedeas being attached hereto and made a part of this my return.

Very Respectfully,

THOMAS F. O'NEIL, *Sheriff.*
By E. J. KIRWAN,
Deputy Sheriff & Chief Jailor.

18 *Certified Copy of Writ of Error and Supersedeas.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings and also in the rendition of a judgment of a plea which is in the said Supreme Court of the State of California, before you, the said Supreme Court being the highest Court of said State of California, in which a decision in the matter could be had, and there being no appeal from the said judgment or other review thereof in any other Court of said State of California permitted or authorized by the laws thereof, and said judgment being final and rendered and entered in a suit and cause and proceeding in the said Supreme Court of California and entitled "In the Matter of the Application of George D. Collins for the Writ of *Habeas Corpus*," being cause numbered Crim. 1374 in said Supreme Court, and wherein the said George D. Collins is the petitioner and Thomas F. O'Neil, the Sheriff of the said City and County of San Francisco, and the People of the State of California are the Respondents, and wherein are drawn in question by the said petitioner, the plaintiff in error, the validity of an imprisonment of the plaintiff in error by authority exercised under said State of California, on the ground of said authority and imprisonment being repugnant to the Constitution, Treaty and laws of the United States, and the decision was in favor of such the validity of said imprisonment and authority, and wherein was drawn in question the construction of a clause of a Treaty and of a clause of a statute of the United States and the decision was against the title, right, privilege and exemption specially set up and claimed by said plaintiff in error under such clause of said Treaty and under said clause of said statute, and said cause also involving the validity of a judgment and order of the Superior Court of the State of California in and for the City and County of San Francisco, rendered and entered in a certain criminal action in and before said Superior Court prosecuted by the People of the State of California against said George D. Collins, said Criminal action being numbered 16415 in said Superior Court, and there having been drawn in question by said George D. Collins before the said Supreme Court of the State of California in said *Habeas Corpus* case, and also in said criminal action, and in said Superior Court, the validity of said judgment and of said order and of the imprisonment by virtue thereof, of the said George D. Collins, by the State of California, and where was drawn in question by the said George D. Collins, the validity of the authority exercised under

said State of California, by said Sheriff by the imprisonment of said plaintiff in error, on the ground that the said judgment and said order and said authority and imprisonment, are repugnant to
19 the Extradition Treaty existing between the United States and Great Britain, and repugnant to the Constitution and laws of the United States and particular to Section 1 of the Fourteenth Amendment of the Constitution of the United States and to Section 5275 of the Revised Statutes of the United States, and the decision of said Supreme Court of the State of California and of said Superior Court were in favor of their validity, whereas in all of which manifest error hath happened, to the great damage, and, injury of the said George D. Collins, as by his complaint appears, we being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the entire record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this Writ of Error, so that you may have the same at Washington in the District of Columbia, on the 7th day of January A. D. 1908, in the Supreme Court of the United States, that the said record and proceedings being there inspected and reviewed, the Supreme Court of the United States may cause further to be done therein, to correct said error, what of right and according to the laws and customs of the United States should be done.

[Seal of U. S. Circuit Court.]

SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

Dated November 8th, A. D. 1907.

The foregoing writ of error is hereby allowed, the same to operate as a supersedeas according to the customs and laws of the United States. The supersedeas to have the sole effect of keeping the plaintiff in error in the same custody in which he now is pending the decision upon this Writ.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Dated November 8th, A. D. 1907.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the Writ of Error and Supersedeas filed as shown by the records of my office.

Witness my hand and the seal of the Court, this 30th day of November, A. D. 1907.

[Seal of Supreme Court of California.]

F. L. CAUGHEY, *Clerk.*
By H. G. GRANT,
Deputy Clerk.

20 *Bench Warrant.*

In the Superior Court City and County of San Francisco, State of California.

Department. No. —.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

The People of the State of California, to any Sheriff, Constable, Marshal/ or Policeman in this State:

An Indictment having been filed by the Grand Jury of the City and County of San Francisco, on the 13th day of July A. D. 1905 in the Superior Court of the City and County of San Francisco, charging George D. Collins with the crime of Felony to-wit Perjury.

You are therefore commanded forthwith to arrest the above named George D. Collins and bring him before that — to answer the charge; or if the Court having adjourned for the term, that you deliver him into the custody of the Sheriff of the City and County of San Francisco, or if he should require it, that you take him before any Magistrate in that County, or in any County in which you arrested him that he may give bail to answer to the charge.

Given under my hand with the Seal of the Court affixed, this the 13th day of July A. D. 1905.

By Order of the Court.

[SEAL.]

JOHN J. GREIF,
County Clerk.
By THOMAS DORAN,
Deputy Clerk.

21 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, John J. Greif County Clerk of the City and County of San Francisco State of California, and *ex-officio* Clerk of the Superior Court thereof (which Court is a Court of record, having a seal), Do Hereby Certify that Thomas L. Doran whose name is subscribed to the attached Bench Warrant was, at the time of signing the same, a Deputy County Clerk in and for said City and County, duly appointed acting and qualified and authorized by law to sign Bench Warrants and full faith and credit are due to all his official acts as such.

And I do further certify, that I am well acquainted with the handwriting of the said Thomas L. Doran and Verily believe that the signature to the said Bench Warrant is genuine.

In Witness Whereof, I have hereunto set my hand and affixed

the Seal of the said Superior Court at my office in the said City and County, this 15th day of July A. D. 1905.

[Seal of Superior Court.]

JOHN J. GREIF,

County Clerk and ex-Officio Clerk of the Superior Court.

(Endorsed:) Superior Court. City and County of San Francisco, State of California. The People of the State of California *vs.* George D. Collins. Bench warrant. The Defendant George D. Collins to be admitted to bail in the sum of Ten Thousand Dollars. John J. Grief, Clerk. By Thomas Doran, Deputy Clerk.

22 *Bench Warrant.*

In the Superior Court, City and County of San Francisco, State of California.

Department No. 11.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

The People of the State of California, to any Sheriff, Constable, Marshal or Policeman in this State:

An Indictment having been presented and filed by the Grand Jury of the City and County of San Francisco, on the 29th day of December A. D. 1905 in the Superior Court of the City and County of San Francisco, charging George D. Collins with the crime of Felony to-wit: Perjury.

You are therefore commanded forthwith to arrest the above named George D. Collins and bring him before that Court to answer the Charge; or if the Court having adjourned for the term, that you deliver him into the custody of the Sheriff of the City and County of San Francisco, or if he require it, that you take him before any Magistrate in that County, or in any County in which you arrested him that he may give bail to answer to the said charge.

Given under my hand, with the Seal of the Court affixed, this the 29th day of December A. D. 1905.

By order of the Court.

[Seal of Supreme Court.]

JOHN J. GRIEF,
County Clerk of the City and County of San Francisco, and ex-Officio Clerk of said Court.
By J. B. MARTIN,
Deputy Clerk.

23 (Endorsed:) Superior Court. City and County of San Francisco, State of California. The People of the State of California *vs.* George D. Collins. Bench warrant. The Defendant George D. Collins to be admitted to bail in the sum of Fifteen Thousand ($15,000) Dollars. John J. Grief, Clerk. By J. B. Martin, Deputy Clerk.

24 *Commitment.*

In the Superior Court, State of California, City and County of San Francisco.

Department No. 11.

SATURDAY, *March 10th*, 1906.

Present: Hon. Albert G. Burnett, Judge.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
GEORGE D. COLLINS.

Convicted of Felony, to Wit, Perjury.

The District Attorney, with the Defendant and his Counsel Messrs. H. C. McPike and Louis Boardman came into Court: The defendant was duly informed by the Court of the Indictment duly presented and filed against him on the 29th day of December 1905 by the Grand Jury of the City and County of San Francisco charging said defendant with the crime of Felony, to wit: Perjury, of his arraignment on the 20th day of January 1906, and plea of "Not Guilty as charged in said Indictment on the 27th day of January 1906 of his trial of the verdict of the jury on the 27th day of February 1906, We the Jury find George D. Collins the Defendant in the above entitled case Guilty as charged in the Indictment herein.

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him; to which defendant moved the Court for a new Trial which Motion was by the — denied to which ruling Defendant excepts. Defendant thereupon moved the Court in arrest of Judgment which Motion was by the Court denied to which ruling Defendant Excepts.

25 And no sufficient cause being shown or appearing to the Court thereupon the Court renders its judgment: That whereas, the said George D. Collins has been duly convicted in this Court of the crime of Felony to wit Perjury.

It is therefore ordered, adjudged and decreed that the said George D. Collins be punished by imprisonment in the State Prison of the State of California, at San Quentin California for the term of Fourteen (14) years. The Defendant was then remanded to the custody of the Sheriff of said City and County, to be by him delivered into the custody of the proper officers of said State Prison at San Quentin California.

Office of the County Clerk of the City and County of San Francisco.

I, H. I. Mulcrevy County Clerk of the City and County of San Francisco, and *ex-officio* Clerk of said Superior Court thereof, do hereby certify the foregoing to be a true and correct copy of the

Judgment entered on the minutes of the said Court in and for the City and County of San Francisco, State of California in the above entitled cause as appears of record in my office.

Attest, my hand and the Seal of the said Superior Court, this 24th day of March A. D. 1906.

[SEAL.]

H. I. MULCREVY, *Clerk*,
By LAWRENCE BUCKLEY,
Deputy Clerk.

I, H. I. Mulcrevy County Clerk of the City and County of San Francisco, State of California, and *ex-officio* Clerk of the Superior Court, in and for said City and County, hereby certify the foregoing to be a full true and correct copy of the original Judgment and Sentence in the above entitled cause, filed in my office on the 27th day of February A. D. 1906.

Attest my hand and seal of said Court, this 24th day of March 1906.

H. I. MULCREVY, *Clerk*,
By LAWRENCE BUCKLEY,
Deputy Clerk.

26 (Endorsed:) No. 16415. In the Superior Court. State of California City and County of San Francisco. Department No. 11. The People of the State of California *vs.* George D. Collins. Commitment.

27 In the Supreme Court of the State of California.

Crim. No. 1374.

In the Matter of the Application of GEORGE D. COLLINS on *Habeas Corpus*.

May 22, 1907.

Petitioner is remanded to the custody of the Sheriff to be held in pursuant of process in both cases.

SLOSS, *J*.

We concur: Henshaw J. McFarland J. Shaw J. Angellotti J. Lorigan J. Beatty C. J.

I, F. K. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an Order as shown by the Records of my office.

Witness my hand and the seal of the Court, this 6th day of June, A. D. 1907.

[SEAL.]

F. L. CAUGHEY, *Clerk*.
By I. ERB,
Deputy Clerk.

28 EXHIBIT 1.

Warrant Under the Extradition Act to the Sheriff of the County Victoria, B. C. the Keeper of the Common Goal at the City Victory, B. C., and to Thomas B. Gibson, re George D. Colli Dated 16th October, 1905, Recorded 16th October, 1905, Jose Pope, Registrar General of Canada.

[OFFICIAL SEAL.]

Canada.

To the Sheriff of the county of Victoria and the Province of Briti Columbia, to the Keeper of the Common *Goal*, at the City of V toria in the said County, and Thomas B. Gibson:

Whereas George D. Collins, accused of the crime of Perjury co mitted within the jurisdiction of the United States of America, w delivered into the custody of you, the said keeper of the Comm *Goal* at Victoria, aforesaid, by warrant of his Honor, Peter Sco Lampman, a Judge under the "Extradition Act", dated the nin teenth day of August, in the year of our Lord, one thousand ni hundred and five, pursuant to the said "The Extradition Act th to await the surrender to the said United States of America.

Now, I do hereby, in pursuance of the said Act, order you, t said Sheriff, and you, the said Keeper of the common *Goal*, to d liver the said George D. Collins into the custody of the said Thom B. Gibson, and I command you, the said Thomas B. Gibson to rece the said George D. Collins into your custody, and to convey hi within the jurisdiction of the said United States of America, a there place him in the custody of any person or persons a

29 pointed by the said United States of America to receive hi

For which this shall be your warrant.

Given under the hand and seal of the undersigned Minister Justice of Canada, this sixteenth day of October, in the year of o Lord, one thousand nine hundred and five.

C. FITZPATRICK,
Minister of Justice.

Endorsed: Under the "Extradition Act" to the Sheriff of t County of Victoria, B. C., the Keeper of the Common *Goal* at t City of Victoria, B. C., and to Thomas B. Gibson *re* George D. C lins, dated 16th October, 1905, Department of the Secretary of St of Canada, Registrar's Branch, Ottawa, 2nd January, 1907. hereby certify the within to be a true and faithful copy of t record of the Original Warrant as entered in Lib. 172, fol. 340. Pope, Deputy Registrar General of Canada.

(Endorsed:) Received Jan. 30 1907. Copy of Extradition Wa rant. George D. Collins Received from Clerk Supreme Court.

30 In the Superior Court in and for the City and County of San Francisco, State of California.

No. 16415.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
GEORGE D. COLLINS, Defendant.

Certificate of Probable Cause.

In the above entitled action, George D. Collins, the defendant therein having duly taken an appeal to the District Court of Appeal of the State of California, in and for the First Appellate District, from the final judgment of conviction heretofore rendered in said action, by the Superior Court in and for the City and County of San Francisco, State of California;

Now Therefore, good cause appearing, this is to certify that in my opinion there is probable cause for the said appeal. Let a copy hereof be served upon the Sheriff of the City and County of San Francisco as provided in section 1244 of the Penal Code.

In witness whereof I have hereunto set my hand this 10th day of March A. D. 1906.

ALBERT G. BURNETT,
Judge of the Superior Court.

31 I, H. I. Mulcrevy, County Clerk of the City and County of San Francisco, State of California, and *ex-officio* Clerk of the Superior Court, in and for said City and County, hereby certify the foregoing to be a full, true and correct copy of the Original certificate of probable cause in the above entitled cause, filed in my office on the 10th day of March A. D. 1906.

Attest my hand and seal of said Court this 10th day of March 1906.

[SEAL.] H. I. MULCREVY, *Clerk.*
By LAWRENCE BUCKLEY,
Deputy Clerk.

(Endorsed:) No. 16415. In the Superior Court in and for the City and County of San Francisco, State of California. People of the State of California, Plaintiff, *vs.* George D. Collins, Defendant. Certificate of Probable Cause. Copy. Received March 12th, 1906.

32 At a stated term, to wit: the November term A. D. 1907 of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Thursday the 26th day of December in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable John J. DeHaven, District Judge.

No. 14629.

In the Matter of the Application of GEORGE D. COLLINS for the Writ of *Habeas Corpus*.

Ordered that respondent, Thomas F. O'Neil, show cause before this Court, if any he has, on Monday December 30, 1907 at 10 o'clock in the forenoon of that day why the writ prayed for should not be granted.

Further ordered that notice of the time and place fixed for said hearing, and of this order be served upon the District Attorney of the City and County of San Francisco, California, on or before Saturday, December 28, 1907.

I hereby certify that the foregoing is a full, true and correct copy of an original Order made and entered in the therein entitled cause.

Attest my hand and the seal of said Circuit Court this 26th day of December, A. D. 1907.

[SEAL.] SOUTHARD HOFFMAN, *Clerk*.
By W. B. MALING, *Deputy Clerk*.

(Endorsed:) No. 14629. U. S. Circuit Court, Ninth Circuit. Northern District of California. *In re* Application of Geo. D. Collins for a Writ of *Habeas Corpus*. Certified Copy of Order. Made and entered Dec. 26, 1907. Received Copy Dec. 27, 1907.

33 (Endorsed:) No. 14629. In the Circuit Court, Ninth Judicial Circuit, Northern District of California. In the Matter of the Application of George D. Collins, For a Writ of *Habeas Corpus*. Answer and Return on Order to Show Cause Why Writ of *Habeas Corpus* should not issue. Filed Jan'y. 3, 1908. Southard Hoffman Clerk. By W. B. Maling Deputy Clerk. Wm. Hoff Cook Asst. Dist. Atty. Atty. for Respondent.

34 At a stated term, to wit: the November term A. D. 1907 of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the Court Room in the City and County of San Francisco, on Monday the 6th day of January in the year of our Lord one thousand nine hundred and eight.

Present: The Honorable William C. Van Fleet, District Judge.

No. 14629.

In re Application of GEORGE D. COLLINS for the writ of *Habeas Corpus*.

Order Denying Application for Writ of Habeas Corpus.

The application for the Writ of *Habeas Corpus* herein, came on this day to be heard George D. Collins, Esq., appeared in *propria personæ* and William Hoff Cook, Esq., Assistant District Attorney of the City and County of San Francisco appeared for and on behalf

of the respondents herein. Thereupon the matter is argued by Counsel and submitted and the Court being fully advised it is ordered in accordance with an opinion that day filed that said petition be and hereby is denied: to which order the petitioner then and there duly excepted.

35 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14629.

In the Matter of the Application of GEORGE D. COLLINS, on *Habeas Corpus*.

Opinion.

George D. Collins, in *Pro. Per.*, for Petitioner.
William Hoff Cook, Assistant District Attorney for the City and County of San Francisco, *Contra*.

VAN FLEET, *District Judge*:

Upon the authority of *Ex Parte* Collins, 154 Fed. 980 and *In Re* Frederich, 149 U. S. 77, the application is denied and the petition dismissed.

(Endorsed:) No. 14629 U. S. Circuit Court, Ninth Judicial Circuit Northern District of California. *In re* Application of Geo. D. Collins for the Writ of *Habeas Corpus*. Opinion. Filed Jan'y 6th 1908. Southard Hoffman Clerk. By W. B. Maling Deputy Clerk.

36 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

In the Matter of the Application of GEORGE D. COLLINS for the Writ of *Habeas Corpus*.

Bill of Exceptions.

Be it remembered that on the 6th day of January A. D. 1908, the above entitled cause came regularly on for hearing before the said Court, the petitioner appearing in his own behalf and the respondents being represented by William Hoff Cook, assistant district attorney of the City and County of San Francisco; whereupon the Court heard the following and no other evidence, (there being no other evidence offered), upon the Return and on the issues presented by the petition, to wit: the complaint and the Return and answer; and made the following rulings to which the petitioner reserved the following exceptions viz:

I.

The petitioner offered to prove that the United States never appointed nor designated any person or persons and never appointed nor designated the sheriff of the City and County of San Francisco, to receive the custody of the petitioner from Thomas Gibson, the person designated in the warrant of extradition and never directed said Gibson to deliver or surrender said petitioner to the sheriff of the City and County of San Francisco.

Whereupon the counsel for respondents stated that he did not contend that any such designation or appointment or direction had been made other than by law.

37 The Court then ruled out said proof tendered by petitioner, to which ruling the petitioner then and there duly excepted.

II.

The petitioner offered to prove that without his consent and against his will and without the consent of the United States or of Great Britain he was by the State of California removed from the custody of the agent of the United States designated in the warrant of extradition, to wit: Thomas Gibson and placed in the custody of the sheriff of the City and County of San Francisco, where he has been held and imprisoned ever since.

The Court held of its own motion that the proffered proof is irrelevant and immaterial and ruled it out, to which ruling the petitioner then and there duly excepted.

III.

Testimony of George D. Collins.

GEORGE D. COLLINS was duly called as a witness on his own behalf and being duly sworn testified in said cause and before said Court as follows:

That he is the petitioner herein. That on the disagreement of the jury on the trial of the extradition case on December 22nd, 1905, the Superior Court set the cause for trial to be had on an early date in January, 1906. In the interval and on December 29th, 1905, the State of California filed in said Superior Court an indictment against the petitioner accusing him of perjury in testimony given by him on the mistrial of the extradition case; and on the said second indictment arrested the petitioner and held him to bail thereon, the petitioner objecting to the prosecution of the second indictment and at each and all steps taken by the State of California in the courts thereof, on the ground that said arrest and said prosecution

38 and the trial, conviction and judgment therein are and were in violation of the Treaty of Extradition between Great Britain and the United States, and of international law and of section 5275 of the Revised Statutes of the United States and of the provisions of section One of the Fourteenth Amendment of the Constitution of the United States in operating to deprive him of his

liberty without due process of law and denying to him the equal protection of the law.

The said Superior Court each time overruled all of said objections and the petitioner duly reserved his exception to each of the rulings. That the petitioner on the date set in January, 1905, for the further trial of said extradition case, insisted upon the trial thereof but the State of California and the said Superior Court overruled his demand and held that he would not at that time be given a further trial of said extradition case but must stand trial on said indictment of December 29th, 1905, to which ruling of said Superior Court he duly reserved his exception.

That ever since then the petitioner has at all times demanded and insisted upon the trial of said extradition case but on motion of the State of California the said Superior Court refused to give him a further trial thereof.

That at all times the petitioner has objected to the postponement of the trial of said extradition case.

That the records destroyed in said extradition case in April, 1906, could have been restored in the same month and were restored in July, 1906, but as no previous notice had been given to the petitioner, the said Superior Court on motion of petitioner set aside and vacated in July, 1906, the order of restoration.

That at any time in the interval between the destruction of the records in April, 1906, and August, 1907, they could have been restored.

That said extradition case could have been brought to trial in said Superior Court in the month of January, February, or March, 1906, and instead of said trial on said indictment of December 29th,
39 1905. That the petitioner has never been requested to select a date for the trial of the extradition case.

That the petition for *habeas corpus* in the Supreme Court of California, referred to in the Return was filed in December, 1906, and was determined in May, 1907, and does not embrace the case as presented in the complaint now being heard in the United States Circuit Court but differs from it in many important particulars.

The Court: There is no need of the petitioner furnishing evidence on that subject; the burden of proof is on the respondents to support the Return.

Cross-examination:

On Cross-examination the witness testified as follows: He admitted that all of the original records in the extradition case were destroyed by fire on April 18, 1906, and the same were not finally ordered restored by the Court until August, 1907, and that immediately upon such order of restoration being made, the District Attorney in Open Court, announced to the Court that said Collins could now move to set said cause for trial if he so desired, but that said Collins contended that it was the duty of the prosecution to bring said cause to trial and the case was not set.

The foregoing constitutes all the oral testimony in the case. The

cause after argument was then submitted to the Court for its decision and judgment.

That upon the hearing of the petition herein, the Court stated that it would take judicial notice of all of the records of the United States Circuit Court for the Northern District of California, and particularly in cause No. 14272 referred to in the sworn answer and return of the respondent herein.

The Court thereupon rendered and entered its decision and judgment denying the petition and complaint, and refusing to grant the Writ of *Habeas Corpus*, to which ruling the petitioner George

40 D. Collins then and there duly excepted.

The foregoing Bill of Exceptions is hereby settled and allowed and certified to be correct this 6th day of February A. D. 1908.

W. C. VAN FLEET.

United States District Judge Presiding in Circuit Court of the United States, Northern District of California.

Endorsed: No. 14329. Circuit Court of the United States Ninth Judicial Circuit Northern District of California. In the Matter of the Application of George D. Collins for the Writ of *Habeas Corpus*. Bill of Exceptions. Filed Feby 6, 1908. Southard Hoffman Clerk. By W. B. Maling Deputy Clerk.

41 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

In the Matter of the Application of GEORGE D. COLLINS for the Writ of *Habeas Corpus*.

Appeal.

In the above entitled matter the said George D. Collins conceiving himself aggrieved by the order and judgment made and entered therein on the 6th day of January A. D. 1908, doth hereby appeal from the said order and judgment to the Supreme Court of the United States for the reasons specified in the Assignment of Error which is filed herewith and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers in the above entitled cause and upon which the said judgment and order were made, duly authenticated, may be sent to the Supreme Court of the United States upon this appeal.

Dated this 6th day of January A. D. 1908.

GEORGE D. COLLINS,

Appellant and Attorney for Appellant.

The foregoing appeal is hereby allowed on appellant giving a bond on appeal in the sum of five hundred dollars.

Dated this 9th day of January A. D. 1908.

W. C. VAN FLEET.

U. S. District Judge, Presiding Judge United States Circuit Court.

(Endorsed:) No. 14629. In the Circuit Court of the United States Ninth Judicial Circuit Northern District of California. In the Matter of the Application of George D. Collins for the Writ of *Habeas Corpus*. Appeal. Filed January 9, 1908. Southard Hoffman Clerk. By J. A. Schaertzer, Deputy Clerk.

42 In the Supreme Court of the United States.

GEORGE D. COLLINS, Appellant,

vs.

THOMAS F. O'NEIL, the Sheriff of the City and County of San Fran
THOMAS F. O'NEIL, the Sheriff of the City and County of San Francisco; THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA, Appellees.

Assignment of Errors.

Afterwards to wit: on the 6th day of January A. D. 1908 at the October Term for the year A. D. Nineteen hundred and Seven of the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, comes the said George D. Collins and says that in the record and proceedings in the above entitled cause also entitled "In the Matter of the Application of George D. Collins for the Writ of *Habeas Corpus*" in the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California, there is manifest error in this to wit:

1. That the said Circuit Court of the United States committed manifest error in refusing to grant to the said appellant the Writ of *Habeas Corpus*, and in refusing to release or discharge the said appellant from imprisonment.

2. That the said Circuit Court of the United States committed manifest error in deciding that the said appellant is not entitled to his liberty upon the Writ of *Habeas Corpus* from the said Circuit Court of the United States.

43 3. That the said Circuit Court of the United States committed manifest error in deciding that the appellant is not imprisoned in violation of the Extradition Treaty between the United States and Great Britian.

4. That the said Circuit Court of the United States committed manifest error in deciding that the said appellant is not imprisoned in violation of Section 5275 of the Revised Statutes of the United States.

5. That the said Circuit Court of the United States committed manifest error in deciding that the said appellant is not imprisoned in violation of international law.

6. That the said Circuit Court of the United States committed manifest error in deciding that the imprisonment of the said appellant is not in violation of nor in conflict with the federal custody, control and jurisdiction acquired by and vested in the United States under and by virtue of the international extradition of the said ap-

pellant from the Dominion of Canada pursuant to the Treaty of Extradition between the United States and Great Britain.

7. That the said Circuit Court of the United States committed manifest error in deciding that the imprisonment of the appellant is not in violation of section One of the Fourteenth Amendment of the Constitution of the United States and in deciding that the said appellant is not by the State of California denied the equal protection of the laws and in deciding that by said imprisonment he is not by said State of California deprived of his liberty without due process of law.

8. That the said Circuit Court of the United States committed manifest error in deciding that the imprisonment of appellant is not in violation of the Extradition Warrant, a copy of which is annexed to the Complaint on file in said Circuit Court in said cause.

44 9. That the said Circuit Court of the United States committed manifest error in deciding that the judgment of the Superior Court in and for the City and County of San Francisco, State of California, rendered against the appellant and referred to in the complaint for the Writ of *Habeas Corpus* is not in violation of the Treaty of Extradition between the United States and Great Britain nor in violation of section 5275 of the Revised Statutes of the United States nor in violation of international law nor in violation of section One of the Fourteenth Amendment of the Constitution of the United States.

10. That the imprisonment of the said appellant and the said judgment are in violation of the said Extradition Treaty between Great Britain and the United States and are in violation of Section 5275 of the Revised Statutes of the United States and are in violation of Section One of the Fourteenth Amendment of the Constitution of the United States and are in violation of the said Extradition Warrant and are in violation of the federal custody, jurisdiction and control of appellant vested in United States by virtue of the international extradition of appellant from the Dominion of Canada under and pursuant to the Treaty of Extradition between the United States and Great Britain.

11. That according to the Constitution, laws and Treaty of the United States, the said appellant is entitled to the Writ of *Habeas Corpus* issuing out of and under the seal of the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California, and is entitled to his discharge from imprisonment upon such Writ of *Habeas Corpus*. Whereas by the law of the land the order and judgment of the said Circuit Court of the United States should have been in favor of the said appellant and against the said appellees, granting to the said appellant the Writ of *Habeas Corpus* and upon such Writ restoring him to his liberty and discharging him from imprisonment.

45 Wherefore the said appellant George D. Collins now prays that the said order and judgment of the said Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California, be reversed, annulled and altogether held for naught and that he be restored to all things he hath lost by reason of said order

and judgment and that the said Circuit Court of the United States be directed to order and adjudge that the said appellant George D. Collins be discharged from imprisonment and restored to his liberty.

GEORGE D. COLLINS,
Appellant and Attorney for Appellant.

(Endorsed:) No. 14629. In the Supreme Court of the United States. George D. Collins, Appellant, *vs.* Thomas F. O'Neil, the sheriff of the City and County of San Francisco, *et al.*, Appellees. Assignment of errors. Filed January 9, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

46 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

In the Matter of the Application of GEORGE D. COLLINS for the Writ of *Habeas Corpus*.

Appeal Bond.

Know all men by these presents, that we, George D. Collins as principal, and S. I. Danby and Robert Ellis as sureties, are held and firmly bound unto the State of California and to the People of the State of California and to the sheriff of the City and County of San Francisco, in the sum of Five hundred dollars, to be paid said obligees; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 25 day of January, A. D. 1908. Whereas lately at a Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California, in a suit there depending in said Court and entitled "In the Matter of the Application of George D. Collins for the Writ of *Habeas Corpus*" an order and judgment was rendered and entered against the said George D. Collins, denying him the Writ of *Habeas Corpus* and the said George D. Collins having obtained an appeal and filed the same in the Clerk's office of the said Court to reverse the said order and judgment in the said suit, and a citation directed to the said obligees, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington. Now the condition of the above
47 obligation is such that if the said George D. Collins shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

GEORGE D. COLLINS [SEAL.]
S. I. DANBY [SEAL.]
ROBERT ELLIS [SEAL.]

UNITED STATES OF AMERICA,
Northern District of California, ss:

Robert Ellis and S. I. Danby being duly sworn, severally depos and say that they are the sureties named in the foregoing bond an are residents of and householders in the said Northern District o California, and are severally worth the amount specified in said bond as the penalty thereof over and above all their debts, and liabilities exclusive of property exempt from execution.

ROBERT ELLIS.
S. I. DANBY.

Subscribed and sworn to before me this 25 day of January, A. D 1908.

[SEAL.] SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court, N. D. C.

This bond is approved,

W. C. VAN FLEET, *Judge.*

(Endorsed:) No. 14629. In the Circuit Court of the United States, Northern District of California. In the Matter of the Application of George D. Collins fo a Writ *of Habeas Corpus.* Bond on Appeal. Filed January 25, 1908. Southard Hoffman, Clerk.

48 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 14629.

In the Matter of the Application of GEORGE D. COLLINS for the Writ of *Habeas Corpus.*

Certificate to Record on Appeal.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing forty-seven pages, numbered from 1 to 47 inclusive, to be a full, true and correct copy of the record and all proceedings in the above entitled cause, and that the same constitute the record on appeal to the Supreme Court of the United States.

I Further Certify that the cost of the foregoing transcript of record on appeal is $24.40; that said amount was paid by the Petitioner; and that the original citation issued in said matter is hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Circuit Court, this 21st day of February A. D. 1908.

[Seal U. S. Circuit Court, Northern Dist., Cal.]

SOUTHARD HOFFMAN,
Clerk of United States Circuit Court,
Ninth Judicial Circuit, Northern District of California.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

GEORGE D. COLLINS, Appellant,
vs.
THOMAS F. O'NEIL, the Sheriff of the City and County of San Francisco, THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA, Appellees.

Citation on Appeal.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the sheriff of the City and County of San Francisco, the People of the State of California and the State of California, appellees, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington within SIXTY days from the date hereof pursuant to an appeal duly allowed by the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California, and filed in the Clerk's office of the said Circuit Court on this 9th day of January A. D. 1908, in a cause wherein George D. Collins is the appellant and you are the appellees, to show cause if any why the order and judgment rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. C. Van Fleet, District Judge of the United States, Northern District of California and acting Circuit Judge this 9th day of January, 1908.

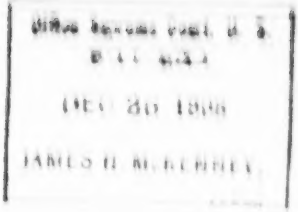
W. C. VAN FLEET,
District Judge of the United States,
Northern District of California and Acting Circuit Judge.

Service of a copy of the foregoing Citation is hereby admitted, this 27th day of January A. D. 1908.

U. S. WEBB,
Per COBB,
Attorney General of the State of California.
W. H. LANGDON,
District Attorney of San Francisco,
By WM. HOFF COOK,
Assistant District Attorney.
L. J. DOLAN,
Sheriff, City and County of San Francisco.
THOS. F. O'NEIL,
Late Sheriff, City and County of San Francisco, Cal.

54 [Endorsed:] Cv. 1462* In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California. George D. Collins, Appellant, vs. Thomas F. O'Neil, the Sheriff of the City and County of San Francisco, *et al.*, Appellees. Citation on Appeal. Filed February 7, 1908. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

Endorsed on cover: File No. 21,070. N. California, C. C. U. S. Term No. 370. George D. Collins, appellant, *vs.* The Sheriff of the City and County of San Francisco, The People of the State of California, and The State of California. Filed March 16th, 1908. File No. 21,070.



IN THE

Supreme Court of the United States.

GEORGE D. COLLINS, *Plaintiff in Error,* *vs.* THOMAS F. O'NEIL, the Sheriff of the City and County of San Francisco, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA, *Defendants in Error.*	No. 241. OCTOBER TERM, A. D. 1908.
GEORGE D. COLLINS, *Appellant,* *vs.* THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA, *Appellees*	No. 320. OCTOBER TERM, A. D. 1908.

Motion to Advance Cause No. 241, October Term, A. D. 1908, and also Cause No. 320, October Term, A. D. 1908, to be Heard and Determined Together.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States and to the Court:

Comes now GEORGE D. COLLINS, the plaintiff in error and appellant, respectively, in the above entitled

causes and presents to you this, his motion, that the said causes now pending in your Honorable Court, and involving his right to his discharge from existing imprisonment, on *habeas corpus*, be ordered advanced upon the docket of the court to an early hearing, and be heard and determined together. In this behalf and to the end that this motion be granted the plaintiff in error and appellant respectfully urges upon your consideration, that on the record before you, in each of said causes, the following questions are raised, viz.: 1. In a case of international extradition, can the accused be arrested, brought to trial, prosecuted and convicted on a charge entirely different from that upon which he has been extradited? Can he be extradited on one charge and tried on another? Where a person is extradited pursuant to the treaty between the United States and Great Britain, upon a specific and described charge of perjury, can the prosecuting state legally use and divert the custody thus acquired and specially entrusted in execution of the treaty, to the entirely different purpose of prosecuting the accused to trial, conviction and sentence upon another and altogether different charge of perjury, and do this, too, while the extradition charge is pending and awaiting trial to a final conclusion, and in exclusion and in substitution of the extradition case? 2. Is the pre-existing *extradiction jurisdiction* over the person of the accused supreme and exclusive over all other jurisdiction of his person, until the expiration of the time specified in Section 5275 of the Revised Statutes of the United States? 3. Can the accused be legally prosecuted to trial and con-

viction on a charge *different* from the one upon which he was extradited, without first affording him a reasonable time and opportunity to return to the country of asylum? 4. It being the well settled principle of international law as well as of the treaty and of the Federal statute that if pending the final trial and determination of the charge on which the accused was extradited, and prior to the expiration of his right to return to the country of asylum, he commits another offense extraditable in character, he can only be prosecuted and brought to trial on the latter, by virtue of a *new* extradition, where he has not waived his right to return to the country granting the extradition, can this principle of international law be successfully evaded by prosecuting him on the subsequent charge *before* the charge on which he has been extradited is given a trial to a final conclusion, and while it is still pending and while he is still held in custody under the supreme and exclusive authority of the international warrant of extradition? Does this alone control the jurisdiction over his person and to the exclusion of every different prosecution? 5. Can the right to return to the country of asylum on the acquittal and final release of the accused upon the extradition charge, and therein his right necessarily arising to *first* be given for that paramount purpose a trial to a final conclusion on the charge upon which he was extradited, be legally postponed or interrupted, intercepted, or interfered with, by prosecuting him to trial, conviction and sentence on another and different charge, to wit, of having committed a subsequent offense? and if so, can such prosecution be

maintained while the extradition case is still pending and awaiting trial to a final conclusion, and while the jurisdiction over his person is restricted and confined to the supreme authority of the warrant of extradition? 6. Would the arrest, trial and prosecution on a subsequent charge of committing a subsequent offense, if occurring and maintained *while the extradition case is pending* and awaiting trial to a final conclusion, and in exclusion of the extradition case, be a violation of the extradition jurisdiction and of the treaty? 7. Would such arrest, trial and prosecution be a violation of Section 5275 of the Revised Statutes of the United States? 8. Would such arrest, trial and prosecution be in contravention of the supreme and pre-existing extradition jurisdiction over the person of the accused, and in violation of the said treaty and of Section 5275 of the Revised Statutes of the United States, and is such extradition jurisdiction existing for the sole purpose of executing the treaty, *supreme and exclusive*, until it has wrought its function? Can the prosecuting state, having acquired the custody of the accused on the faith alone of the extradition, for one specific purpose, use the custody thus entrusted in execution of the treaty *to another and different purpose, not authorized by the treaty?* 9. Can the prosecuting state legally intercept the due execution of the treaty and the regular course of the extradition case, in its orderly progress to a final conclusion, and supersede the due execution and enforcement of the treaty, and cut off the right to return to the country of asylum, by arresting and prosecuting the accused on another and differ-

ent charge? 10. If the accused is not brought to trial to a final conclusion *within a reasonable time* upon the charge on which he was extradited, does the indictment thereby become null and void and is he entitled under the treaty and the Federal statute to his discharge on *habeas corpus?* And is the period of three years and more a reasonable time, especially in view of the fact that the law of the prosecuting state fixes *sixty days?* 11. Can the prosecuting state lawfully drop and discontinue the prosecution of the extradition case, after getting possession of the accused, on the faith alone of the extradition and on the faith alone of the promise to give him a trial to a final conclusion on the charge upon which his extradition was granted, and permit him to return unmolested and depart in peace to the country of asylum, when acquitted, and *substitute* in its place and stead while the extradition jurisdiction still exists, and still persists in the full supremacy of its exclusive control over the person of the accused, for the sole purpose of executing the treaty, another and different prosecution on another charge, and thereby deprive the accused of the fundamental rights conferred upon him by the treaty, by Section 5275 of the Revised Statutes of the United States and by international law? 12. Has the sheriff of San Francisco any power to imprison the accused under the extradition warrant, the latter expressly restricting its authority to the person appointed by the United States and the sheriff never having been so appointed? All these questions are based upon and sustained by the printed record now before your Honorable Court in each of said causes, affirmatively showing that the appellant and the

plaintiff in error did not at any time waive his rights, but on the contrary at every stage of the proceedings insistently asserted them and interposed at every step his objection and protest, invoking in that behalf the Treaty of Extradition between Great Britain and the United States, and Section 5275 of the Revised Statutes of the United States and the well settled principles of international law pertaining to said questions. That the printed Brief and Argument of appellant and plaintiff in error, on file herein, and consisting of 203 pages, fully presents the principles and cites the authorities on all said questions, and establishes beyond doubt that his imprisonment is in violation of said treaty and of said Federal statute, and of international law. That plaintiff in error and appellant is actually imprisoned by the sheriff of the City and County of San Francisco, State of California, in the county jail of said city and county, and upon no other claim than that of the warrant of extradition and the collateral judgment of conviction hereinafter mentioned; and he is seeking herein to obtain his release and discharge from said imprisonment upon *habeas corpus* and on the grounds that said imprisonment is in violation of the said Treaty of Extradition and of Section 5275 of the Revised Statutes of the United States and of international law. That appellant and plaintiff in error was upon demand of the United States extradited on the 16th day of October, A. D. 1905, pursuant alone to the said Treaty of Extradition, from the Dominion of Canada upon a specific charge of having, on the 30th day of June, A. D. 1905, committed in the City and County of San

Francisco, State of California, the crime of perjury in verifying by his oath the general issue presented by his plea and answer to a complaint filed in a civil suit then pending against him in the Superior Court of the State of California in and for said City and County of San Francisco. That said civil suit never has been brought to trial, nor otherwise disposed of. That the said charge on which he was extradited has never been brought to trial to a final conclusion, but on the contrary and over his objection has been by said State of California and said Superior Court *indefinitely postponed*. That he is nevertheless still imprisoned under the warrant of extradition by said sheriff and in said jail. That said warrant of extradition is in the record, and bears date and was issued on October 16th, A. D. 1905. That notwithstanding the pendency of said extradition case before said Superior Court and awaiting trial to a final conclusion the State of California, on the 29th day of December, A. D. 1905, and against his protest, arrested appellant and plaintiff in error upon an indictment filed in said Superior Court on that date, purporting to charge him with committing another and different offense of perjury, to wit, subsequently to his surrender and in said extradition proceedings and while said extradition case was pending; and said State of California, despite his protest based upon and invoking said treaty and said Section 5275 of the Revised Statutes of the United States and international law, arrested and prosecuted him to trial and conviction, to judgment and sentence on said second charge of perjury, to the exclusion of said extradition case,

and while the said extradition case was still pending before said Superior Court and awaiting trial, and remained undisposed of either by trial to a final conclusion or otherwise; that said extradition case is still undisposed of. That he was by the judgment of said Superior Court sentenced to imprisonment for *fourteen years* in the penitentiary of said State of California on said second perjury charge. That said sentence is final but void, and said sheriff also imprisons appellant and plaintiff in error in said county jail, under said sentence and pending its execution. That after said judgment and sentence, the appellant and plaintiff in error sued out and was granted in the Supreme Court of the State of California, the writ of *habeas corpus* for his release and discharge from said imprisonment, on all of the grounds heretofore stated, and on said *habeas corpus* raised each of the questions hereinabove enumerated, but said court decided all said questions adversely to him and by its judgment expressly remanded him to the custody of said sheriff as existing when said writ of *habeas corpus* was granted, and *to be held by said sheriff in custody upon said warrant of extradition and upon said judgment and sentence on said second charge of perjury;* and said sheriff has ever since imprisoned and does now accordingly so imprison appellant and plaintiff in error, in said county jail, and for no other cause now upon any other claim or pretense. That the said judgment of said Supreme Court of California is final. That a writ of error was duly sued out and allowed him, from the Supreme Court of the United States to the Supreme Court of the State of Cali-

fornia on said judgment in said *habeas corpus* case. That said writ of error and the citation thereon have been duly served and filed, and the case on said writ of error has been docketed and the record filed and printed in the Supreme Court of the United States, and is there pending and awaiting hearing and determination, and is numbered 241, October Term, A. D. 1908. That the printed brief and argument of appellant and plaintiff in error, consisting of 203 pages, have been filed in said cause No. 241, and also in said cause No. 320, October Term, A. D. 1908, which is an appeal taken and prosecuted by the said George D. Collins, from the final judgment and decree of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California, refusing to grant him, the said appellant, on the facts above stated, the writ of *habeas corpus* for his release and discharge from said imprisonment on the same grounds hereinbefore set forth, and presents the same questions as are presented on said writ of error. That said appeal was duly taken and allowed and citation served; and thereafter the case on said appeal was docketed and the record filed and printed in the Supreme Court of the United States, and is numbered 320, October Term, A. D. 1908, and the case is now pending and awaiting hearing and determination in your Honorable Court.

That upon the facts presented in the said records respectively in each of said cases the said and existing imprisonment of appellant and plaintiff in error is unlawful and in violation of said Treaty of Extradition and of Section 5275 of the Revised Statutes of the United States and of international law; and

he is therefore entitled to a reversal of each of said judgments of the State Supreme Court and the United States Circuit Court respectively, and to his restoration to liberty. That he has been refused bail. That these motions are based upon the foregoing facts and upon said record on file in your Honorable Court in each of said causes, and on said Brief and Argument of appellant and plaintiff in error, on file therein. That the said Brief and Argument have been served upon and a copy delivered to the counsel for said appellees and said defendants in error.

WHEREFORE plaintiff in error and appellant respectfully presents to your Honorable Court these his motions, that said causes numbered as hereinbefore stated, to wit: No. 241, October Term, A. D. 1908, and No. 320, October Term, A. D. 1908, be by your Honorable Court ordered advanced to an early hearing and heard and determined together.

GEORGE D. COLLINS,
Counsel for Appellant and
for Plaintiff in Error

Dated January 18th, A. D. 1909, at the City of Washington, in the District of Columbia.

CERTIFICATE OF COUNSEL.

UNITED STATES OF AMERICA. } ss.

This is to certify that the undersigned, an attorney and counsellor-at-law of the Supreme Court of the United States, has carefully prepared and examined the foregoing motions, and that the matters therein set forth are well founded in fact and in law, and that the facts therein averred and therein recited, are true of his own knowledge.

GEORGE D. COLLINS,
Attorney and Counsellor-at-Law.

Dated January 18, A. D. 1909, at the City of Washington, District of Columbia.

IN THE SUPREME COURT OF THE UNITED STATES.

George D. Collins,
Plaintiff in Error,

vs.

Thos. F. O'Neil, the sheriff of the City and County of San Francisco, the People of the State of California, and the State of California,
Defendants in Error.

No. 241
October Term
A. D. 1908.

George D. Collins,
Appellant,

vs.

The Sheriff of the City and County of San Francisco, the People of the State of California and the State of California,
Appellees.

No. 320
October Term
A. D. 1908.

NOTICE OF MOTION.

NOTICE IS HEREBY GIVEN YOU that at a Supreme Court of the United States to be holden at the Capitol in the City of Washington, in the District of Columbia on Monday, the 18th day of January, A. D. 1909, at the opening of the court on that day, the plaintiff in error and the appellant, respectively, in the above entitled causes will present and submit to the said the Honorable the Supreme Court of the United States, his motions to advance said cases and each of them, to an early hearing to be heard and determined together. A copy of said motions is herewith served upon you, and the motions will

be made upon the facts and matters therein stated and for the reasons therein given, and set forth.

Respectfully,

GEORGE D. COLLINS,
Counsel for Appellant and for Plaintiff in Error.

To the said defendants in error and to the said appellees and their counsel, Hon. U. S. Webb, the attorney general of the State of California, and W. H. Langdon, Esq., the district attorney of the City and County of San Francisco, and William Hoff Cook, Esq., assistant district attorney of the City and County of San Francisco.

Dated December 16th, A. D. 1908.

IN THE SUPREME COURT OF THE UNITED STATES.

George D. Collins,
Appellant,
vs.
The Sheriff of the City and County of San Francisco, the People of the State of California and the State of California,
Appellees.
No. 320 October Term A. D. 1908.

George D. Collins,
Plaintiff in Error,
vs.
Thos. F. O'Neil, the sheriff of the City and County of San Francisco, the People of the State of California, and the State of California,
Defendants in Error.
No. 241 October Term A. D. 1908.

AFFIDAVIT OF SERVICE OF MOTION AND OF SERVICE OF NOTICE OF MOTION TO ADVANCE CASES, ETC.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

E. H. ORR, being duly sworn, deposes and says that she is now and for many years last past has been a citizen of the United States and a resident of the State of California. That she is a stenographer and as such has been in the employ of Mr. George D. Collins, attorney and counsellor-at-law, that on the 16th day of December, A. D. 1908, in the City and County of San Francisco, State of California, and at the request of Mr. Collins, she personally deposited in the United States mail, duly

postpaid, to wit: in the United States Post Office in said City and County of San Francisco, and mailed in sealed envelopes addressed severally to the following attorneys and counsel for the said appellees and defendants in error, to wit: Hon. U. S. Webb, attorney general of the State of California, and also in a sealed envelope addressed to W. H. Langdon, Esq., district attorney of the City and County of San Francisco, and also in a sealed envelope addressed to William Hoff Cook, Esq., assistant district attorney of the City and County of San Francisco, all of whom then and there were and are residents thereof, directed to each of them respectively, at their respective and proper office address in said City and County of San Francisco, with postage duly prepaid on each of said sealed envelopes and contents, a true copy of the motion dated January 18, A. D. 1909, and of the notice of said motion, which notice is dated December 16, A. D. 1908, to advance the above entitled causes to an early hearing and determination, to be heard and determined together by the Supreme Court of the United States. That each of said sealed envelopes, at the said time and place of the said mailing of the same contained a true copy of said motion and also of said notice of said motion. That each of said sealed envelopes, mailed as aforesaid and the said contents of each were as aforesaid, deposited by affiant in said mail to the said proper address of each of said attorneys and said counsel for said appellees and said defendants in error, duly postpaid, at such time as to reach each of said counsel by due course of mail, at least thirty days before the 18th day of

January, A. D. 1909, the date and time fixed in said notice of said motion. That a copy of the printed brief and argument of the appellant and plaintiff in error, on file in said causes above entitled has been served upon and delivered to said William Hoff Cook, Esq., of counsel for said appellees and defendants in error.

Subscribed and sworn to before me, this 16th day of December, A. D. 1908.

E. H. Orr.

Julius Calmann,
Notary Public in and for the City and County of San Francisco, State of California.

[NOTARIAL SEAL.]

Office Supreme Court, U. S.
FILED.
MAR 29 1909
JAMES H. McKENNEY,
CLERK.

9

IN THE

SUPREME COURT OF THE UNITED STATES.

GEORGE D. COLLINS,
Plaintiff in Error,
vs.
THOMAS F. O'NEIL, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA,
Defendants in Error.

No. 241.
OCTOBER TERM, A. D. 1908.

(IN ERROR TO SUPREME COURT OF CALIFORNIA.)

GEORGE D. COLLINS,
Appellant,
vs.
THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA,
Appellees.

No. 320.
OCTOBER TERM, A. D. 1908.

(APPEAL FROM UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.)

Final Argument for Appellant and Plaintiff in Error.

GEORGE D. COLLINS,
Counsel for Appellant and for Plaintiff in Error.

BARNARD & MILLER PRINT, CHICAGO.

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IN THE

Supreme Court of the United States.

GEORGE D. COLLINS, *Plaintiff in Error,* *vs.* THOMAS F. O'NEIL, Sheriff of the City and County of San Francisco, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA, *Defendants in Error.*	No. 241. OCTOBER TERM, A. D. 1908.

(IN ERROR TO SUPREME COURT OF CALIFORNIA.)

GEORGE D. COLLINS, *Appellant,* *vs.* THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA, *Appellees.*	No. 320. OCTOBER TERM, A. D. 1908.

APPEAL FROM UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF CALIFORNIA.

Final Argument for Appellant and Plaintiff in Error.

This argument is presented in connection with that urged in the Brief. We preface the argument with the comprehensive point that the decision of both the lower courts is in the last analysis, to the effect and culminates in the result that no rights are conferred on the accused, nor obligation imposed in his favor, by the treaty of extradition nor by Section 5275 of the Revised Statutes of the United States, nor by international law; and that the extradition jurisdiction established by both the treaty and the statute over his person, is not supreme and exclusive, but subordinate and inferior to and can be absolutely nullified by the laws and the judicial process of the State of California, notwithstanding the sixth article of the Constitution of the United States, and notwithstanding the fundamental principle that the custody of the accused derived alone from his extradition, cannot be used for a purpose different from that authorized in the special case, by the treaty and the statute, at least not while the charge on which he was extradited, is pending and awaiting trial to a final conclusion. The lower courts also decide that the accused can be perpetually imprisoned in the extradition case, without trial, and that such imprisonment is not unlawful. We desire to urge with great emphasis that every right conferred on the accused by the law of his extradition, —the supreme law of the land, has been virtually denied and repudiated in the decisions rendered against his right to his liberty. If the views of the lower courts are the law, "it will be found in our books; if it is not to be found there, it is not law." Lord Camden in *Entick* v. *Carrington*, 19 Howell

State Trials, 1029, approved in *Boyd* v. *United States*, 116 U. S., 627. It will be found that not only there is no case in the books to sustain the decisions in question, but that the law is exactly to the contrary, on both principle and authority.

I.

OPENING STATEMENT.

The essential facts of the case are as follows: The appellant and plaintiff in error was extradited in October, 1905 (more than three years ago), from Canada, pursuant alone to the treaty of extradition between Great Britain and the United States, for trial in the Superior Court at San Francisco upon a specific and specially described charge of perjury laid in the indictment as having been committed on June 30, 1905, in verifying by his oath, before a notary public, the general issue in a civil suit wherein he was defendant, and at that date pending in the state court; the suit never had a *bona fide* purpose and has never been brought to trial, nor set down for trial. Instead of pursuing the only legitimate and proper course of a trial of the issue as to the truth or falsity of the oath, *in the case where it was presented*, the plaintiff had recourse to a criminal prosecution; the defendant having previously become a resident of Canada, was extradited on the specific charge subsequently made, that this oath in the civil suit, tendering issue in the case, was untrue and constituted perjury. The civil suit was then abandoned and the extra-

dition case was substituted. The fact of the matter is that the extradition was merely a pretense and pretext to bring the accused back to San Francisco for ulterior purposes of an infamous conspiracy against him and against his rights. *In November, 1905*, the extradition case was brought to trial before the Superior Court in San Francisco; after a protracted hearing the jury disagreed on December 22, 1905, and were by the court discharged; the case was set for further trial on a day early in the following month. Before the date so set arrived, and on December 29, 1905, just one week after the jury disagreed, the prosecution procured and filed in the same court another and altogether different indictment against the extradited accused, charging him with another and different offense of perjury, alleging that it was committed by him on December 12, 1905, in testifying as a witness in his own behalf on the mistrial of the extradition case. *The matters assigned as perjury in this second indictment are of such character that acquittal on the extradition charge would be res adjudicata of an essential element involved in, and be a bar to the prosecution on the second indictment.* The point is fully discussed and the authorities cited in the Brief, page 67 and following. Over our objection, this second charge was substituted for the extradition case and prosecuted to judgment and sentence of fourteen years' imprisonment. The result accomplished in prosecuting to a final conclusion, to sentence and judgment, the second indictment to the exclusion and in subversion of the extradition case, was a fraudulent deprivation of the fundamental rights conferred on

the accused by the *treaty* and by Section 5275 of the Revised Statutes of the United States—the supreme law of the land. It was an unlawful substitution in fraud of the *treaty rights* of the accused, of the local prosecution on the second indictment,—to the virtual extinction of the extradition case. The facts are all established by the record, and they show beyond dispute that on December 29, 1905, the accused, while under the paramount protection of the law and jurisdiction of the extradition, was *arrested* on the second indictment (Rec., writ of error, 16); the second charge was then very diligently pressed and prosecuted to a final conclusion, to judgment and sentence, March 10, 1906, of fourteen years in the state penitentiary—the maximum penalty. The extradition case was dropped, its prosecution discontinued and abandoned; the second accusation substituted. At every step in these manifestly unlawful proceedings, from the arrest to and including the sentence on the second indictment, the accused vigorously and persistently objected and protested, invoking continually in that behalf, and at every step, the rights supreme and paramount granted him by the treaty of extradition between the United States and Great Britain and by Section 5275 of the Revised Statutes and by international law; but the state courts summarily overruled and rejected all his objections and protests, and went ahead with the second prosecution, despite his *treaty rights*. The judgment and sentence on the second indictment have been affirmed on appeal in the state court, and are final. The extradition case is still pending and undisposed of, now three years and more; it drags

forth its lengthened shadows in mockery and delusion; the accused is still being imprisoned in the common jail at San Francisco, on the assumed authority of the defunct warrant of extradition. There has been no trial of the extradition case, not even an effort of the prosecution to bring it to trial, since the jury disagreed on *December 22, 1905*, and the often repeated demands of the accused for a trial of the case to a final conclusion have all been overruled and refused. His imprisonment upon the warrant of extradition is manifestly indefinite and perpetual. The record shows affirmatively that the extradition case could have been given the necessary trial instead of the indictment of December 29, 1905, and could have been brought to trial in January, February or March, 1906, or at any time since, except during a few days in April, 1906, when the papers in the case were not available, having been destroyed by fire. These papers, however, could have been restored the same month, as the record states, but were not actually restored by the prosecution until a year and four months subsequently. There was no reason or excuse for this delay and none has been suggested. Nor has the restoration of the papers operated to infuse any life into the long previously defunct obligation to prosecute the extradition case; it still lays dormant—and is quite impossible of legal restoration; the disintegrating process of lasting inanition has made it vanish forever, but, as stated, the accused is still imprisoned on the charge upon which he was extradited, *and has been permanently refused trial.* It is now three years and more, as shown by the record, since the state Supe-

rior Court positively and peremptorily refused to grant him a further trial of the extradition case and ordered it indefinitely postponed, despite his objections and remonstrance expressly predicated on the *treaty* and Section 5275 of the Revised Statutes of the United States. It is manifest from the record that the further prosecution of the extradition case has been abandoned *in the sense that it has not been brought to trial to a final conclusion within a reasonable time*, and that no good cause or excuse exists for the wilful and deliberate suspension of its prosecution to a finality; there is no justification in law for the perpetual imprisonment of the accused, without trial, on the international warrant of extradition. The only object of the warrant was to bring the accused to trial to a final conclusion and within a reasonable time, on the charge upon which he was extradited. As this trial has been absolutely refused (the record is positive on that proposition), it results that he is entitled to his liberty; it is his legal right, derived from the supreme law of the land, to "depart in peace." The failure to prosecute the extradition case within *sixty days* after the disagreement of the jury entitles the accused, under the law of California, to his discharge on *habeas corpus*. So held by the state Supreme Court in *Ex parte Begerow*, 133 Cal., 349. This fixes by convenient analogy the period of reasonable time within which the accused must be brought to trial in California, in cases of international extradition, or else be discharged. His right is derived from the treaty and from Section 5275 of the Revised Statutes of the United States.

It will be understood, then, that on the case presented by the record, it is established that the accused is deprived of his liberty by the sheriff of San Francisco, acting for the State of California, under claim of authority solely consisting, first, in the judgment and sentence on the indictment of December 29, 1905—a lawless proceeding, absolutely void because *de hors* and in violation of the extradition; secondly, on the assumed authority of the warrant of extradition which has long since expired by limitation of law and which, even were it now operative, confers no authority on the sheriff, as it does not run to him nor grant him any power to imprison the accused. The fantastic and lawless manipulation and legerdemain by which the prosecution of the indictment of December 29, 1905, has been made to prevail over the supremacy of the extradition, and to the extinction of the paramount rights of the accused, vested in him by the treaty and Section 5275 of the Revised Statutes, the supreme law of the land, are scarcely worthy of passing criticism. The novelty of the thing (*it is entirely without sustaining precedent*) seems to have possessed the state authorities with an enchanting and irresistible impulse to override the supreme law, and substitute the inferior and subjective power of the state. It is probably an experimental innovation, very characteristic of government in California—as history teaches. It is certainly unconstitutional.

The case comes before the Supreme Court of the United States on a writ of error to the Supreme Court of California, directed to its judgment of date May 22, 1907, on *habeas corpus*, remanding the ac-

cused to the custody of the sheriff on both the judgment of conviction and the warrant of extradition. The case also comes before the court on an appeal from the judgment of the United States Circuit Court, Northern District of California, refusing to grant the writ of *habeas corpus*.

All possible questions as to the jurisdiction of the Supreme Court of the United States on both the writ of error and the appeal, and the points as to the jurisdiction and duty of the United States Circuit Court to grant the writ of *habeas corpus* on the showing made, are fully presented and discussed and the authorities cited in the Brief, pages 13, 14, and 43 to 53. The case is properly, and in its entirety, now before the Supreme Court of the United States for final determination on its merits, upon a full and complete record (see Brief, pages 13 and 14), amply supporting all the points relied upon and urged by the appellant and plaintiff in error to sustain his claim that his imprisonment is in manifest violation of the treaty of extradition between the United States and Great Britain; in violation of Section 5275 of the Revised Statutes of the United States; in violation of international law, and in violation of the Fourteenth Amendment and of Article VI of the Constitution of the United States.

It is our contention, stated generally, that on the facts presented in the record, the state is absolutely deprived of all power to proceed against the accused or to hold him in custody upon any criminal charge whatever other than the one specified in the extradition case; and that as to the latter, the process has become *functus officio* and has expired by lim-

itation of time. The *treaty* is both the source and measure of the entire power of the prosecuting state over the person of the accused, and being a power derivative, special and limited, must be strictly pursued in order to maintain the delegated jurisdiction. Any deviation from the prescribed authority is an excess of power. Without the treaty and the proceedings had pursuant to its provisions, the state could acquire no jurisdiction at all over the accused. Having invoked the treaty and by its authority solely and exclusively secured the presence of the accused within its territory *for the purpose of a specific criminal prosecution*, the state is strictly confined, in its exercise of power over him, to the special case for the trial of which the treaty alone authorized his transfer and surrender. As to any and all other matters the state is denied by the *treaty* all jurisdiction over his person, and must permit him to return to the country of asylum, must afford him reasonable time and opportunity to so return, before proceeding and arresting him upon another and different charge. This is the only possible method of keeping faith with the treaty. As pointed out by Lord Derby in the *Winslow case* (Foreign Rel. U. S., 1876, p. 278), the person extradited is simply "lent" to the prosecuting state on condition that his custody be only used in the case specified; and that when this has been done, or a reasonable time has elapsed, adequate for the purpose, and it has not been done, then that the accused be permitted to return without further detention or molestation to the country of asylum, the country that had "lent" him for the

special and limited purpose prescribed by the treaty. A special bailment for a special purpose, with reversion to the country of asylum. It may be likened to a special declaration in trust for a specified purpose, with reversion to the country of asylum when the purpose designated has been accomplished, or a reasonable time has elapsed, and the trust has not been performed. Manifestly, it would be no answer to the non-performance of the obligation of the trustee to say that the subject of the trust was wanted in detention on a matter entirely foreign to the trust, and therefore must not be restored. This would simply be a repudiation of the trust. And even if there were no reversion prescribed, still the trustee's obligation to devote the subject delivered to the purpose of the trust pursuant to which possession had been alone obtained, would *per se* prohibit any deviation or departure in furtherance of some other object, foreign to the trust. According to all legal conceptions, the trustee must *first* perform the obligations imposed by the trust pursuant to which he obtained possession of the subject he holds in custody; the law of his trust duties is necessarily supreme and paramount over any and every different user of the subject entrusted to him. These are very well understood and quite fundamental doctrines in jurisprudence, not only demanded by common honesty, manifest justice and fair dealing, but essential to sound governmental polity, such as is undoubtedly necessary to the maintenance of honorable intercourse between all civilized nations. These considerations protect the accused against the use of his custody for a purpose foreign to the extradition,

at least while the charge on which he has been extradited is pending and awaiting trial to a final conclusion; and secure to him legal rights enforceable by the writ of *habeas corpus*.

All the obvious duties referred to as being incumbent upon the trustee in the case supposed, have been grossly violated in prosecuting the appellant and plaintiff in error on a charge different from the one upon which he had been extradited, and in not bringing to trial to a final conclusion the extradition case, within a reasonable time after the disagreement of the jury in December, 1905, and in holding him in perpetual imprisonment under the international warrant of extradition, without a trial determinative of the case. We contend also that the warrant of extradition confers no authority on the sheriff to imprison the accused. It does not run to him and on its face requires that the custodian be appointed by the United States, thus the more effectively preserving the rightful control of the law of the extradition and the better enabling the President to protect the accused as provided in Section 5275 of the Revised Statutes of the United States. The sheriff has never been appointed by the United States (Rec., on appeal, 20) and there is no law appointing him. He has no more authority to imprison the accused than is possessed by any other stranger to the process. It seems he acquired the custody through his predecessor in office, who in turn obtained it from Gibson, the agent of the United States, not as erroneously stated in the return "agent of the State of California" (Rec., writ of error, 10); but this erroneous averment in

the return as to Gibson's position, explains how it happened that the accused came into the possession of the sheriff, Gibson being considered merely a representative of the state and the entire extradition proceeding being considered an affair exclusively of the State of California, as though it were simply a case of interstate rendition. The warrant in requiring that the United States make the appointment of the custodian of the accused, denied Gibson any power of appointment. In fact, as shown on the face of the certificate and endorsements on the warrant of extradition appearing in the record, the whole thing was an afterthought and the sheriff did not obtain the process until after the writ of *habeas corpus* issued. The original warrant passed from Gibson, the police officer, to his superior, the chief of police of San Francisco, in whose custody it was when destroyed by fire in April, 1906.

We want to say in reference to the point that the extradition case was refused trial and its prosecution abandoned in favor of the indictment of December 29, 1905, that these facts are averred in the petition for *habeas corpus* and not denied either in the return nor in the special answer to the petition, tendering and defining the issues. (Rec. on appeal, 2, 3 and 4; also page 6 and following. Rec. on writ of error, 3, 4, 7 and 8; also page 11 and following.) These then are deemed admitted facts in the case. *Kohl Lehlback*, 160 U. S., 293. None of the material facts are disputed in the return or in the special answer. What is said by the state Supreme Court as to the relative functions of the petition and return, cannot apply to the special answer pur-

porting to tender and define the issues. The uncontradicted evidence showing the refusal of trial on the extradition charge and the wilful failure to bring the case to trial within a reasonable time and the substitution of the second indictment in its place, to the discontinuance and abandonment of all prosecution of the extradition case, will be found at page 20 and following of the record on the appeal. All the questions we raise are *Federal* in their nature and origin, and pertain to a subject exclusively within the domain of the national sovereignty of the United States. The constitution delegates exclusive power over the subject of international extradition to the nation, and also prohibits the several states from acting in relation to the matter. The constitution makes the treaty of extradition and the federal statute passed to protect the rights of the accused (Section 5275 R. S. U. S.) the supreme law of the land. It is axiomatic that in the presence of the supreme law of the land all pertinent laws and judicial process of the subordinate and subjective state are silent and inoperative; they are for the time being as absolutely devoid of authority as if in fact non-existent. It is a maxim of general jurisprudence that *In praesentia majoris cessat potentia minoris.* Aside from this, it is a monstrous proposition that concedes to the prosecuting state the power to cut off and destroy the right of asylum *reserved to the accused as a condition sine qua non of the preceding extradition,* and in that regard vests authority in the receiving state, to prosecute him on a subsequent charge of committing a subsequent and extraditable offense,

without affording the country of asylum the right or opportunity to protect its sovereignty and in that behalf to first determine whether on the evidence adduced the asylum reserved should be further abridged or withdrawn so as to permit of the subsequent prosecution. This is really and in result placing the right of asylum and the sovereignty of another nation, at the mercy of the state antagonistic to its existence. It is equally monstrous to say that the prosecuting state has power to deprive the accused of his paramount and supreme right to a trial to a final conclusion of the extradition case, within a reasonable time, to the exclusion of any trial or prosecution on any other and different charge, by the scheme of substituting for the extradition case, another indictment on another charge, thereby evading and escaping the obligations imposed by the *treaty* and by Section 5275 of the Revised Statutes of the United States.

All the questions presented are fully covered by appropriate assignments and by adequate specifications of error, the latter set forth at page 14 and following of the Brief.

II.

ENUMERATION OF THE QUESTIONS RAISED.

The principal questions presented for decision are the following:

1. What is the sole and only purpose of a treaty of extradition if it be not to bring the accused to trial to a final conclusion and within a reasonable

time on the specific charge upon which he is extradited; and is this purpose restrictive of the power of the prosecuting state over the accused?

2. What limitation is placed by the treaty of extradition and by Section 5275 of the Revised Statutes of the United States upon the prosecution of the accused on a criminal charge, and is the limitation supreme and paramount or is it subordinate and inferior, and subject to the control of the local laws of the prosecuting state?

3. Has the accused the fundamental right to a trial to a final conclusion of the charge on which he has been extradited, and if he has, does this *per se* negative the power of the prosecuting state to arrest and try him on a charge different from the one specified in the extradition proceedings while the latter are pending and awaiting final determination, and is there any distinction in law between prior and subsequent offenses in the application of the prohibition against the trial of the extradited accused on any charge different from the one specified in the extradition process while the extradition case is pending and awaiting trial to a final conclusion? Here again the question arises, is the law of the extradition supreme and paramount over all the laws and judicial proceedings of the prosecuting state or merely subjective and inferior?

4. Is it competent for the prosecuting state to discontinue the prosecution of the extradition case and divert the extradition custody of the accused to his prosecution on another and different charge? Has the accused the right to return to the country granting his extradition, if acquitted on the extradition

charge, and if he has, does this carry with it the right to an opportunity in due and consecutive course of judicial procedure, to obtain an acquittal, and can either this right or the right to return, be hindered, delayed, postponed, obstructed or destroyed by the prosecuting state, by means of his arrest and trial on another and different charge while the extradition case is pending and awaiting trial to a final conclusion?

5. Is there a right of asylum conferred by the country granting the extradition, and *reserved to the accused as a condition sine qua non of his extradition*, and against every charge and prosecution other than the one specified in the special extradition. And as to any such collateral charge or prosecution, does the law deem the accused, pending his right to return and before its expiration, to constructively be and remain within the territory of the country granting the extradition, with exclusive power and authority in that nation to determine from the evidence adduced whether the asylum *reserved* shall again be abridged or withdrawn to the extent of permitting his arrest and prosecution on a subsequent charge of committing an extraditable offense subsequently to the previous extradition surrender, but before the expiration of the right to return, and is the decision of the country of asylum, conferring authority, under the circumstances stated, an essential pre-requisite to any other prosecution against him?

6. Has the prosecuting state the power to cut off, impair, interfere with, postpone or destroy the fundamental and existing right of the accused to return

to the country of asylum, by arresting and prosecuting him on a charge of committing an offense subsequently to the extradition surrender? Is the right to return conferred by the treaty and Section 5275 of the Revised Statutes, *anterior* to the alleged subsequent offense, supreme and paramount over all the laws and judicial process of the State of California, involved in and the basis of the subsequent prosecution?

7. What is the purpose of the right conferred on the extradited accused to return to the country of asylum on final release upon the extradition charge, if it be not to protect him from prosecution on any and every charge different from the one specified in the extradition proceedings, unless authorized by a new extradition?

8. Is it a fraud on the *treaty*, and on the rights of the accused, conferred by the treaty and by Section 5275 of the Revised Statutes of the United States for the prosecuting state to drop and discontinue the prosecution of the extradition case, and thereupon substitute in its place a different prosecution, and seize the person of the accused upon another and different charge, thus cutting off his right to return to the country of asylum, and also destroying his right to a trial of the extradition case to a final conclusion *within a reasonable time*, especially when if the accused had been tried and acquitted on the extradition charge, it would in law constitute a bar and be *res adjudicata* on an essential element in the subsequent prosecution on the subsequent charge, and thus would have preserved and maintained the rights conferred on the accused by the law

of his extradition, instead of working their destruction, as was done here, by the method or scheme of substituting a different prosecution on a different charge. In other words, is it competent for the prosecuting state to drop and discontinue the prosecution of the extradition case, and substitute in its stead the arrest and trial of the accused on another and different charge, thereby destroying or defeating the rights conferred upon him by the law of his extradition,—the supreme law of the land?

9. Can the accused be lawfully imprisoned under the warrant of extradition, after the prosecution of the charge on which he was extradited has been discontinued and abandoned in the sense that it has not been brought to trial to a final conclusion, within a reasonable time, but instead another charge on another and different indictment has been substituted and prosecuted to judgment, while the extradition case was pending?

10. Is there created and vested by force of the *treaty* pursuant to which the accused has been extradited, any jurisdiction over his person in virtue of the international warrant of extradition; and if there is, can such jurisdiction over him be held subjective and inferior to the local laws and judicial process of the prosecuting state, or is this extradition jurisdiction over the person of the accused supreme and paramount, and consequently *exclusive*, until it has wrought its function in the final termination of the extradition case and the release and discharge of the accused? Without this exclusive jurisdiction in the extradition case, how is it

possible to carry into execution the requirements of the treaty and of Section 5275 of the Revised Statutes?

11. Are the rights conferred and the obligations imposed in favor of the extradited accused by the *treaty* and by Section 5275 of the Revised Statutes of the United States, and is the due and consecutive execution of the *treaty* in carrying out the extradition by trial to a final conclusion of the charge therein specified, as the essential initial step in the enforcement of the treaty and of the statute, to be con sidered supreme and paramount in their operation and requirements as against all the local laws and judicial process of the prosecuting state?

12. If it is competent and permissible, as held by the state Supreme Court, to arrest and prosecute the extradited accused on a subsequent charge of committing an offense subsequently to the surrender in extradition, without first affording him an opportunity to return to the country of asylum, can this be lawfully done while the extradition case is pending and awaiting trial to a final conclusion and while the person of the accused is held in custody by virtue of the supreme authority of the international warrant of extradition, and the *jurisdiction over his person* persists in the extradition case, in full force and effect in right of its exclusive control as established by the treaty, the supreme law of the land (a question though pointedly raised, yet absolutely ignored by the state Supreme Court and the United States Circuit Court); and is this not after all a question as to which is supreme and paramount, the treaty of extradition and Section 5275 of the Re-

vised Statutes of the United States, or the local laws and judicial process of the prosecuting state?

13. Is the extradition a general and unqualified surrender and transfer of the accused to the prosecuting state without any asylum *reserved* to him against all other charges and without any restraint or restriction against doing with him whatever the prosecuting state may see fit or expedient in the application of its criminal law and to the same precise extent as fully and completely as if he had never departed from its territory, and had never acquired an asylum in another nation, and there never had been such a thing as an extradition in his case; and does the extradition cease and terminate and become absolutely *functus officio* the moment the accused is brought within the territory of the prosecuting state, leaving him to the general control of its criminal process on any subsequent charge, before he is given a trial upon the specific accusation on which he was extradited and imposing no obligation whatever requiring that he first be given a trial of the latter, but leaving it entirely at the option or election of the prosecuting state whether the accused shall be given a trial at all on the extradition charge, and whether he shall be accorded the right to return which is always dependent on the final termination of the extradition case?

14. Or is the extradition special and limited, and does it confine the authority and power of the prosecuting state in all the proceedings against the accused, to the specific charge on which he has been extradited, depriving the receiving state of all jurisdiction over his person except for the one purpose

prescribed by the *treaty* and by Section 5275 of the Revised Statutes of the United States, to wit: the trial to a final conclusion of the charge on which the extradition has been granted, thus necessitating a new extradition for an extraditable effense subsequently committed pending the trial of the charge upon which the accused had been extradited, and before the expiration of his right to return, unless he voluntarily waived this right by failing to return within the prescribed time.

15. Is it within the power of the prosecuting state to use the custody of the accused—the custody derived by virtue alone of the international warrant of extradition, for a purpose entirely different from that authorized by the *treaty* in granting his extradition, and do this by means of the scheme of discontinuing the prosecution of the extradition case and substituting for it another and different prosecution on another and different charge, to wit: on an offense alleged to have been committed subsequently to the extradition surrender, and one of such nature that had the accused been tried and acquitted on the charge upon which he was extradited it would have been *res adjudicata* and a bar to the subsequent prosecution? See *United States* v. *Butler*, 38 Fed. Rep., 499; *Coffey* v. *United States*, 116 U. S., 436, 445; *Cooper* v. *Com.*, 106 Ky., 909. These authorities establish the point that the acquittal would be *res adjudicata* of an essential element involved in and be a bar to the subsequent prosecution. By prosecuting the subsequent charge to judgment and sentence and substituting it in place of the extradition case the accused was thereby defrauded of all the

rights granted him by the *treaty* and by Section 5275 of the Revised Statutes of the United States.

16. Can the obligations imposed and the rights conferred in favor of the accused by the treaty of extradition and by Section 5275 of the Revised Statutes of the United States be nullified, frustrated, postponed or successfully evaded by the method or device of prosecuting the person extradited on another and different charge than the one specified in the extradition proceedings, *prior* to the final trial and determination of the extradition case?

17. Is the international warrant of extradition a limitation on the jurisdiction of the prosecuting state over the person of the accused, and if it is what in law are considered to be its terms and conditions?

18. When the accused is brought within the prosecuting state by virtue of the treaty of extradition, is it competent for the receiving state to drop and abandon the extradition charge, discontinue its prosecution and substitute for it and in its stead a prosecution on another charge, thus postponing and in effect destroying both the right of the accused to a trial to a final conclusion, within a reasonable time, of the extradition case, to the exclusion of every different charge, and also his right to return to the country of asylum upon his acquittal in due and consecutive course of law, of the charge on which he was extradited?

19. Is there anything in Article 3 of the convention of 1889 which authorizes the prosecuting state to defeat, frustrate or postpone the extradition jurisdiction over the accused, thus in effect making the

treaty stultify itself, by the scheme of prosecuting him on a charge of committing an extraditable offense subsequently to the extradition surrender, and do this while the extradition case is pending and awaiting trial to a final conclusion, and to its virtual extinction, or which authorizes such subsequent prosecution without the necessity of a new extradition?

20. Is it competent for the prosecuting state to imprison the accused *indefinitely* and perpetually on the warrant of extradition, without trial, and what is the effect in law of a failure to prosecute the extradition case to a final conclusion within a reasonable time? Does it terminate the extradition jurisdiction over the person of the accused and entitle him to his discharge on *habeas corpus?*

21. Does the warrant of extradition confer any authority on the sheriff to imprison the accused?

None of these questions assail the reserved rights of the states. The entire subject of international extradition has been confided by the constitution to the United States in right of its national sovereignty, and its power is necessarily supreme and exclusive. It is true, the several states are thus prevented from interposing the local criminal process in the prosecution of crime, while the extradition jurisdiction over the accused continues in full force and effect, but there is nothing unusual in this. For instance, in the case of *Neagle,* 135 U. S., 1, the State of California was prevented from trying him on an indictment for murder, even though the acts charged had been committed on its territory, because he was proceeding by authority of the laws of the United

States, the supreme law of the land, and therefore beyond the jurisdiction of the state. The principle is directly applicable to the treaty of extradition between the United States and Great Britain, and to the effect of Section 5275 of the Revised Statutes of the United States, and to the international warrant of extradition, with its exclusive authority as the sole and only permissible process in holding jurisdiction over the person of the extradited accused. He is beyond the jurisdiction of the state *on any charge or prosecution* other than the one specified in the extradition case. Jurisdiction to prosecute on another charge can be acquired, but not while the extradition case is pending, nor except on the pre-existence of certain conditions and circumstances prescribed by law, which do not exist here.

The decision of both the state Supreme Court and that of the United States Circuit Court proceed primarily and fundamentally on a question quite fallacious and essentially *extra-judicial*, as to a supposed expediency rather than upon the questions of law raised by the accused. The dominating thought as disclosed in the opinion of each court is that of *expediency* in keeping the accused within the grasp of the prosecuting state on the subsequent charge, so as to prevent the possibility of his escape. One would suppose this to be a matter of police concern alone. Nor does it afford the slightest justification in law or in expediency, for taking from the accused his undoubted and paramount right to a trial of the extradition case to a final conclusion and within a reasonable time, in priority over all other charges, and prosecutions, nor permit while the extradition

case is pending, his arrest or prosecution on the subsequent charge of committing a subsequent offense. At best it could only furnish a reason or rather a cause in reason and law inadequate for depriving him of his right to return to the country of asylum on his acquittal in the extradition case. Under no view would it sanction the arrest and trial of the accused on the subsequent charge *while the extradition case is pending and he is held under the supreme and paramount jurisdiction of the international process by virtue of which alone he was brought into the territory of the prosecuting state for the one purpose of carrying out the treaty.* This point though urged with much emphasis upon both the lower courts was disposed of by purposely ignoring it. The notion of *expediency* which controlled the decision is exclusively of police and not of judicial concern. We should think there would be no difficulty in keeping the accused under police surveillance after his discharge in the extradition case, and thereafter arresting him on the subsequent charge if he failed to return to the country of asylum within the prescribed time. If he did return then he might be extradited if the case permitted. If the offense is one that is not extraditable, then the treaty prohibits the deprivation of the asylum reserved, just as in the instance of prior non-extraditable offenses. The prosecuting state must yield the demands of its local criminal law to the higher authority of the sovereignty of the extradition,—the "sovereignty of the right of asylum" as manifested in and regulated by the *treaty* and by Section 5275 of the Revised Statutes of the United States.

The courts are not allowed to substitute their notions of expediency for the requirements of the *treaty*. As well said by Mr. Justice STORY, speaking for the court in *The Isabella*, 6 Wheat., 72:

> "This court is bound to give effect to the stipulations of a treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions and requirements of the treaty or take away any qualification or integral part upon any notion of equity or general convenience or substantial justice."

All of this is very obvious, yet it escaped the attention of the lower courts, with the result that a very fallacious notion of a supposed *police expediency* controlled the decision, and in submission to it, the court placed a very forced and indefensible construction on two irrelevant and insignificant circumstances—one, the fact that in the decided cases, the principle we invoke had only been actually applied (but without any stress on that feature) to collateral prior offenses, no case having arisen where the collateral charge was of a subsequent offense; and from this it is very unreasonably deduced that the principle does not apply to the latter class of offenses, forsooth it has never as yet been so applied, the case not having arisen,—a manifestly illogical conclusion, one destructive of all principle, and a glaring *non-sequitur*, it being admitted that the case has not arisen;—the other, the fact that Article 3 of the convention of 1889 is confined in the immunity it confers, to prior offenses, and from this the very illogical inference is made that subsequent extraditable offenses may not only be prosecuted,—a proposition no one disputes, but that they may be prose-

cuted, forcing the *treaty* to stultify itself, while the preceding extradition case is pending and awaiting trial, and while the pre-existing extradition jurisdiction over the person of the accused, continues in its exclusive control and in full force and effect in right of its supremacy for the purpose of carrying out the sole and only object of the extradition, and carrying into execution the treaty of extradition, and further that such subsequent prosecution is permissible without a new extradition, and further still, that its effect is to cut off and destroy the supreme and paramount right of the accused derived from the treaty and also from Section 5275 of the Revised Statutes, to return unmolested to the country of asylum upon his acquittal of the charge on which he was extradited, and before being prosecuted on any charge different from that specified in the international warrant of extradition.

This opposing view of both the lower courts, controlling their decision contrary to these fundamental principles in the law of international extradition, surely is giving to a supposed violated subordinate and inferior law a pre-eminence in authority over the supreme law of the land, that, to say the least, is certainly revolutionary and astounding in setting up the local power and process of the state over that of the nation, in a case where the nation is vested by the Constitution with exclusive authority.

These very singular views of the state court are all conclusions utterly unreasonable and indefensible in law and in principle, and would simply make the *treaty* contradict and stultify itself, making it operate to defeat the very jurisdiction it had previ-

ously created over the person of the accused as an essential element in the pre-existing extradition. We entirely fail to perceive why a "subsequent offense" should have priority in prosecution over a pre-existing extradition and to the virtual extinction of the latter. What becomes of the *supremacy of the treaty* and of Section 5275 of the Revised Statutes of the United States?

The truth of the matter is that the third article of the convention of 1889 goes no further than any other provision that would be irrelevant to the question;—it permits by not prohibiting the prosecution of subsequent offenses in that it does not extend to them the immunity it gives against the prosecution of prior offenses. Very obviously, it would be a most irrational and ridiculous thing to embrace subsequent offenses in such an immunity clause, while undoubtedly quite proper to bring prior offenses within its scope. As to the latter class of offenses, the extradition in its character of a judicial proceeding would rightly conclude every *previous* offense not specified in the proceedings where extraditable and of course every prior offense not extraditable, for as to the latter, the asylum secured would of necessity bar their prosecution. But in the nature of things, this could never be true of subsequent extraditable offenses in relation to the preceding extradition. And right there we want to point out that it is argued by our adversary that the prosecuting state should be allowed to proceed against the accused on the subsequent charge of committing the subsequent offense because he is within its territory and it holds jurisdiction over its territory.

The answer to this is plain and self-evident; the prosecuting state has only a limited and qualified jurisdiction over the accused and can no more prosecute him on the subsequent alleged offense than on the prior offense, simply because he may physically be within its territory. As very forcibly said by Judge JACKSON in the *Hawes* case:

> "With me," said that distinguished judge, "when there is a solemn duty staring me in the face, which would preclude a trial, although the party might be in the custody of the court, I would not disgrace my government or my country by the assumption of jurisdiction, when by such assumption the plighted faith of my government would be violated." (The plighted faith is to bring the accused to trial to a final conclusion and within a reasonable time on the extradition charge alone.) "The prisoner cannot be tried for any offense for which he was not extradited; and although he may be within the bar of the court or in a jail under the control of this court, as this court is bound to regard the treaty, it is outside of its jurisdiction to proceed with the trial as 'the supreme law of the land' otherwise provides." (Vol. 16 Albany Law Journal, 362.)

This, like the ruling in the *Rauscher* case, 119 U. S., 407, was uttered long prior to the convention of 1889, and as the latter in its third article is merely declaratory of the pre-existing law, it is of no practical operation in any event, the maxim of the law being *expressio eorum quae tacite insunt nihil operatur.* Lork Coke terms it *clausula inutilis.* (4 Rep., 73.) It needs no argument to support the very obvious proposition that the third article does not say expressly nor impliedly that the accused may be prosecuted on the subsequent charge

of committing a subsequent extraditable offense, without a new extradition, nor that such prosecution can be maintained while the pre-existing extradition case is pending and awaiting trial and while the extradition jurisdiction over the person of the accused still continues in right of its supremacy to the exclusion of all local laws and judicial process of the prosecuting state for the one purpose of carrying out the sole and only object of extradition. The *treaty* cannot be made to thus stultify itself nor to thus defeat the jurisdiction it has created for the very purpose of carrying its provisions into execution. Nor in law is it permissible to derive authority to prosecute subsequent offenses, as a result of inference or implication from the third article of the convention of 1889. (Pomeroy on Int. Law, Sec. 199; Twiss on Law of Nations, Sec. 223.) It follows that there is nothing in the third article of the convention of 1889 to justify the views of the state Supreme Court, nor to give those views the slightest support in reason, logic or law.

In the effort to subserve the assumed *expediency* which is made the basis of and the controlling consideration in the opinions of both the state Supreme Court and the United States Circuit Court it is suggested that forsooth the existing line of judicial decisions consisted of cases where the collateral prosecution was for offenses alleged to have been committed *prior* to extradition and presented no question as to subsequent offenses, that therefore, the point not being up for decision, a distinction exists between prior and subsequent offenses even though in none of the decided cases nor in the books

is there the slightest intimation or indication to countenance any such distinction, and there certainly is no rational basis for it in principle or authority; on the contrary, the reason and purpose of the law are alike most conclusively opposed to it. In no decided case is any stress placed upon the fact inherently adventitious and merely incidental that the collateral prosecution was for a prior offense.

The *treaty* cannot be arbitrarily narrowed down to a meaningless distinction. It was on the principle entirely because the collateral prosecution proceeded on the charge of a *different* offense from the one specified in the extradition process that the courts in all the cases referred to, held it in conflict with both the treaty and Section 5275 of the Revised Statutes of the United States, and prohibited because unauthorized by the treaty, and in conflict with the statute; now clearly a "subsequent offense" is just as absolutely and in every possible sense a *different* offense within the meaning and reason of the prohibition as is a prior offense. We must look to the *principle of law* which the courts applied, not to the special facts of the special case.

While undoubtedly the treaty only permits extradition for offenses committed, and therefore in that view deals alone with prior offenses, still a "subsequent offense" is an offense committed and as such, if within the treaty enumeration, is, when the accused avails himself of his right to return, properly the subject of extradition, he being in the meantime and by construction of law deemed within the territory and protection of the laws of the country of asylum for all the purposes of a criminal prose-

cution as to the subsequent charge; of that there cannot be the slightest doubt whatever. The preceding extradition could be very easily defeated and the accused be defrauded of his *treaty rights*, if it were permitted the prosecuting state to proceed against him on a charge of committing a subsequent offense, to the exclusion and subversion and practical extinction of the extradition case. It could quite readily be utilized as a scheme or pretext to fraudulently deprive the accused of the asylum reserved to him as a condition *sine qua non* of the previous extradition, vesting in him as it does the right to return to that asylum on his acquittal of the charge upon which he was extradited, and the right to procure such acquittal in the due and regular course of law.

To protect and maintain this fundamental right of asylum, the power is naturally and necessarily resident alone in the nation that granted the preceding extradition, to determine from the evidence adduced whether the accused shall be again extradited and the asylum again withdrawn, modified or abridged *pro tanto* for the special purpose of permitting his prosecution on the alleged subsequent extraditable offense. This prerogative of the sovereignty of asylum is of course supreme and exclusive. And even if there were no right of asylum reserved to the accused, still it is self-evident, the prosecuting state would be absolutely without authority to arrest and try him on the "subsequent offense" *while the charge on which he had been extradited was pending and awaiting trial and while the extradition jurisdiction over his person existed and continued in exclusive*

control, in right of its supremacy, for the paramount purpose of carrying out the sole and only object of the treaty.

These points most clearly and conclusively dispose of the suggestion replete in fallacy that the treaty deals only with offenses committed, and therefore, being thus confined to prior offenses, it does not concern itself with prosecutions for "subsequent offenses," and that consequently the prosecuting state has full power to act without the need of a new extradition and even to the exclusion and extinction of the pending extradition. The sophistry of the thing is most glaringly conspicuous; tested by its effect on the *treaty*, it is nothing short of repudiation; it is utterly subversive of the supreme law of the land.

We may perhaps be permitted to say in passing that it is manifest the attempted distinction between prior and subsequent offenses is one so flimsy that in practice it would be a very easy matter to nullify it, for the criminal law does not restrict the prosecution in the proofs to the precise date alleged in the indictment, but permits the evidence of the offense to be addressed to any previous date within the period prescribed by the statute of limitations; so that while ostensibly and on the f. of the record the accused is charged with an offense alleged to have been committed at a date subsequent to the extradition surrender, yet in point of fact his conviction "as charged" may rest entirely on evidence of the offense having been committed prior to the extradition. We do not think any such facility or opportunity for fraud should be permitted. We merely

suggest the possibility as a convenient method of evading the *treaty* by a state so disposed, if once it were held that a distinction existed in the law of extradition between prior and subsequent offences, allowing the latter to be prosecuted in subversion and practically to the extinction of all the rights and obligations arising out of the extradition case. It is impossible to find any support for the attempted distinction, in reason, principle or authority. There is, it is true, a distinction to this extent:—the extradition as a judicial limitation on the right of asylum, concludes all previous extraditable offenses not embraced within its scope; and hence there can be no prosecution for a prior extraditable offense, unless the accused fails to exercise his right to return to the protection of the asylum reserved to him; but a subsequent offense could not in the nature of things be so concluded and therefore may be prosecuted; but not while the extradition case is pending, for that would be to defeat the object of the *treaty;* nor unless there is a new extradition, for otherwise the pre-existing treaty right to return, would be nullified, and the reserved asylum constructively extended to the accused by operation of law, would be destroyed, all of which the *treaty* prohibits.

Aside from the necessary and inherent distinction, to which we have referred, between the prosecution of prior and subsequent offenses, there is no difference, and there certainly is no legal, logical or rational difference between them in the application of the principle for which we are contending. If, as is self-evident, the prosecuting state can only act with-

in the circumscribed limits of the special authority delegated by the *treaty*, in the special case, surely this applies with particular force to a collateral prosecution on a subsequent charge of committing an extraditable offense subsequently to the extradition surrender, and prohibits all such arrests and prosecutions *while the extradition case is pending and awaiting trial to a final conclusion*, and afterwards, until the accused has been given a reasonable time and opportunity after his final release in the extradition case, to return to the country of asylum and has failed so to do. This decisive point is very strongly re-enforced by the consideration that the pre-existing jurisdiction over the person of the accused by virtue of the international warrant of extradition is necessarily exclusive because supreme and paramount—the *treaty* being the supreme law of the land. It is a jurisdiction specially recognized and protected in its exclusive power and authority by the provisions of Section 5275 of the Revised Statutes of the United States, enacted for the very purpose of maintaining it in all its integrity and supremacy over all the local laws and judicial proceedings of the prosecuting state. It is this controlling jurisdiction that is made by the Supreme Court of the United States the ultimate ground of the decision in the *Rauscher case*, 119 U. S., 407, where the court, in concluding a very exhaustive and learned opinion upon the general subject, say:

> "Under the views we have taken of the case the jurisdiction of the court to try such an offense" (one *different* from that on which he was extradited), "if the party himself was properly within its jurisdiction, is not denied; but

> the facts relied upon go to show that while the court did have jurisdiction to find the indictment, as well as of the questions involved in such indictment, *it did not have jurisdiction of the person at that time, so as to subject him to trial.*" (Italics ours.)

Surely this very clearly is applicable to the case of an arrest and prosecution of the accused while the extradition case is pending, on a collateral charge of committing an extraditable offense subsequently to the extradition surrender. The acquisition of the requisite jurisdiction in such a case, over the person of the accused, is legally impossible *while the extradition case is pending.* So, too, the well settled doctrine of international law that as to all charges and prosecutions other than the one specified in the pre-existing extradition proceedings, the accused is deemed to be and remain within the territory of the country of asylum, and within the protection of its laws, thus necessitating a new extradition where the alleged subsequent offense is within the treaty enumeration, unless the accused voluntarily waives his rights by failing to return, is a doctrine specially aimed at all proceedings involving the arrest and prosecution of the accused on a charge of committing an extraditable offense subsequently to his surrender, but before the expiration of his right to return. If the accused can be legally prosecuted on such subsequent charge, while the extradition case is pending, and while he is held by virtue of the international warrant of extradition for the one purpose of bringing him to trial within a reasonable time, to a final conclusion, upon the specific charge therein specified, then, clearly, both

his *treaty* right to such trial and his *treaty* right to return to the country of asylum are absolutely cut off and destroyed by the inferior and subjective authority of the subordinate laws and judicial process of the prosecuting state.

The treaty has but one object, and to which all else is subservient—the bringing of the accused to trial within a reasonable time and to a final conclusion upon the specific charge on which he was extradited. It would clearly be incompatible with the supreme obligation this necessarily imposes on the prosecuting state, for the latter to arrest and try the accused on a different charge. The integrity of the treaty must be strictly guarded and maintained. Says Wharton, in the third volume of his work on Criminal Law (7th Ed.), page 34 (quoted approvingly by Spear on Extradition (3d Ed.), page 71):

> "The sole object of extradition is to secure the presence of the fugitive in the demanding state for the purpose of trying him for a specified crime. The process is not to be used for the purpose of subjecting him collaterally to a criminal prosecution other than that specified in the demand."

Such being the sole and only object of the *treaty*, to which everything else is subordinated by the supreme law of the land, will it be seriously contended that the receiving and prosecuting state, charged with the special and paramount duty and obligation to carry out this object, can, instead, defeat or frustrate or postpone it, and prosecute the extradited accused to conviction and sentence on a different indictment, presenting an entirely different case from the one authorized by the treaty in the par-

ticular extradition? To put this question is to answer it. The prosecuting state is manifestly denied any such power of nullification. Says Mr. Justice FIELD, with the concurrence of Justices MILLER and CLIFFORD, and to which there can be no possible dissent in respect to the principle stated:

> "The case is not essentially different from a surrender of a fugitive from justice under an extradition treaty. The United States have such treaties with several European nations, and whatever may have been the extravagant doctrines respecting the rights of the states at one time in some parts of the country, it will not now be pretended that with the enforcement of such treaties any state, by her laws or judicial proceedings, can interfere."
>
> *Taylor* v. *Taintor*, 16 Wall., 377.

The prosecuting state is not vested with any power at all to disregard the treaty nor to substitute its own local criminal process in a collateral prosecution *de hors* the extradition. It is a well established principle that:

> "Whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the state; and whoever may have the right, it is to be protected."
>
> *Baker* v. *Shy*, 9 Heisk., 85.

In consonance with the sole and only purpose of the *treaty*, the extradited accused is not alone simply protected by the supremacy of the extradition jurisdiction over his person, but he is vested with the rights paramount and supreme, derived from the *treaty* itself, to a trial within a reasonable time and to a final conclusion of the specific charge on which

the extradition was granted, and when acquitted or finally released on that charge, to return to the country of asylum before he can be lawfully arrested or put to trial on any other and different extraditable offense. This is the well established law of the extradition, and it is the law of the *treaty*. It is the law that the State of California has grossly violated in the existing imprisonment of the appellant and plaintiff in error. It is not a question, as seems to be supposed by the state Supreme Court, whether the extradition was sought originally with fraudulent intent to get possession of the accused ostensibly on one charge, but really to prosecute him on another and different accusation. International law is not concerned with the presence or absence of this or that mental obliquity. It is a practical science and deals with results. The fact that the result is actually accomplished puts it on the same footing in law as if originally intended. Says Spear:

> "Whether the cheat was deliberately planned or was simply an afterthought would make no difference with the fact itself. In either event the purpose for which the delivering government, under the stipulations and obligations of a treaty, granted the custody, and which was avowed by the demanding government in making the requisition, would not be the one for which the custody would be used."
>
> Spear on Extradition (3d Ed.), page 82.

The point is, there exists a jurisdictional prohibition, a denial of power, against any user of the custody of the accused for a purpose different from his prosecution on the specific charge upon which he has

been extradited. Say the Supreme Court of the United States:

> "The general scope of the two treaties makes manifest an intention to prevent a state from obtaining jurisdiction of an individual where extradition is sought on one ground and for one expressed purpose, and then, having obtained possession of his person, to use it for another and different purpose."
>
> *Johnson* v. *Browne*, 205 U. S., 309.

It is not so much a question of fraud or of good or bad faith as it is a question of power and of jurisdiction. However, in answer to the views of the state Supreme Court, we insist that the same and greater evils and greater dangers of evasions and frauds against the *treaty* attend the collateral prosecution of "subsequent offenses" than are possible in the case of prior offenses. There are the same and greater evils and mischiefs to be guarded against, and greater danger of subterfuge, pretext and false pretense—a proposition fully established in the Brief, pages 9, 10, 30, 31, 32, 33, 148, 149, 155 and 187. The state Supreme Court does not claim that the accused has forfeited any rights conferred upon him by the supreme law of the *treaty* and by the supreme law of Section 5275 of the Revised Statutes of the United States; *and, manifestly, rights conferred by the supreme law of the land cannot be forfeited because of a violation of a subordinate and inferior law.* We quite agree with the state Supreme Court in its statement that there is no breach of international faith in compelling the accused, "in common with other persons within the jurisdiction, to assume responsibility for any offense which he may commit

after his return." But the court is clearly wrong in deducing from this its quite impossible conclusion that the arrest and prosecution on the subsequent charge can be had or maintained *while the accused is held under the supreme and exclusive authority of the international warrant of extradition for the necessarily paramount purpose of carrying out the sole and only object of the treaty.* By committing an offense, no jurisdiction attaches *ipso facto* over the person of the accused. He must be brought within the legal operation of judicial process. It is essential to arrest his person. (*People* v. *Genet*, 59 N. Y., 81.) This cannot lawfully be done while he is subject to the exclusive jurisdiction of the supreme law of his extradition. Necessarily the primary and highest obligation is to first keep perfect faith with the *treaty*, and this can only be accomplished by first complying with its requirements before intercepting and interposing with the subordinate and inferior authority of the prosecuting state in a prosecution of the accused on a charge not authorized by the extradition process, but absolutely foreign to it and entirely local and collateral. It is not permitted to thus use the custody of the accused for a purpose not authorized by the *treaty*.

The law of the extradition is the supreme law of the land. Its power and authority over the accused and the special rights it confers on him extend in full force and effect into the prosecuting state and throughout the life of the extradition case in absolute supremacy and control over all the local laws and judicial process.

The custody and jurisdiction of the supreme law

of the extradition are *sui generis* and do not merge into nor are they ever the local custody and jurisdiction of the prosecuting state. They are of the law of the nation, the manifestation of the dominant sovereignty of the United States in the national exercise of its constitutional powers, upon a subject exclusively national, and over which it has exclusive control. In the presence of the supreme law, the laws of the subordinate and inferior state are, for the time being, necessarily silent and inoperative; otherwise the supreme law would not be supreme.

III.

THE EXTRADITION TREATY AND SECTION 5275 OF THE REVISED STATUTES OF THE UNITED STATES, AS LIMITATIONS ON THE PROSECUTION OF THE ACCUSED.

We have repeatedly pointed out, and we insist, that the juridical question whether an extradited person can be arrested and brought to trial on a charge different from the one specified in the extradition proceedings is a question of *power and of jurisdiction*—not merely a question of good or bad faith. The sole and only purpose of extradition, as regulated by treaty, is to bring the accused to trial to a final conclusion on the specific charge of crime described in the proceedings. For this purpose there is established over the accused by the supreme law of the land a jurisdiction paramount and exclusive and continuing in the full supremacy of its authority and control, until the extradition case is finally disposed of and terminated, and the accused is finally released and discharged. In all extradition pursu-

ant to *treaty*, the jurisdiction and power of the prosecuting state over the accused is necessarily special in its nature, and consequently limited in its authority to prosecute him on a criminal charge. It is a power necessarily confined and restricted to the prosecution of the specific charge on which the extradition was granted. In the first place, crime is local. If the accused has sought and obtained an asylum in another country, there can be no prosecution against him while the asylum thus acquired continues to extend its protection to him. The asylum conferred is an attribute of national sovereignty and its protection is supreme and indisputable, until relinquished by the voluntary act of the nation granting it, or renounced by the accused. We are now speaking of extradition and not of kidnapping; these two essentially different things were confounded by the state Supreme Court in laboring to show, and contrary to both principle and authority, that there is no right of asylum vested in the accused when extradited pursuant to treaty,—a most untenable and indefensible proposition and proceeding upon a complete misunderstanding of the law.

Whether the asylum secured shall or shall not be relinquished in a given case is, in the nature of things, a matter entirely and exclusively for the "sovereignty of asylum" to determine. This, in modern times, is *regulated* and controlled by means of a treaty; and treaties thus made are of necessity special in their essential character, and confer only a special and limited jurisdiction over the accused, with reversion to the country of asylum, or rather to the asylum that is always reserved as a condition

sine qua non of every extradition, and against every charge or prosecution for any offense different from the one on which the accused has been extradited. These treaties are termed "Treaties of Extradition," and prescribe the cases in which and the conditions upon which extradition is granted and obtained by the nations entering into them. It is the well established doctrine that they confer legal rights and legal obligations in favor of the accused, enforceable in courts of law. The terms and conditions fixed by the *treaty*, whether express or implied, are of the very essence of the power conferred over the accused and make that power of a special, limited, defined and restricted nature, extending no further than the specific charge on which the extradition is granted. For all other purposes, and particularly for the purpose of arresting and prosecuting the accused on a subsequent charge of committing a subsequent offense, the *treaty*, by a necessary implication, denies to the prosecuting state all authority over the accused and places him by construction of law in the territory of the "sovereignty of asylum," with the exclusive right and prerogative there resident to determine as in the first and preceding extradition, from such evidence as may be adduced, whether the asylum shall again be withdrawn, and whether the accused shall be surrendered for trial and prosecution on the different charge of committing subsequently, but before the expiration of his right to return to the country of asylum, another extraditable offense. This power in the sovereignty of asylum is indispensable to the protection and maintenance of the asylum it has in right of its

sovereignty *reserved* to the accused as a condition *sine qua non* of his previous extradition. Now, clearly, the sole and only function of a treaty of extradition is to restrict, abridge and regulate the "sovereign right of asylum" in the special case by transferring the accused to the territory of the prosecuting state, not absolutely, but for the one, sole and special purpose of bringing him to trial to a final conclusion on the specific charge upon which he is extradited and on none other; with the condition annexed that *upon his acquittal of that charge* he be given a reasonable time and opportunity to return, without detention or molestation, to the protection of the nation from whose asylum he had been forcibly taken, by authority of the *treaty*, for the special and defined purpose we have stated. By manifest implication of law, a trial upon any charge other and different than that specified in the extradition proceedings is as strongly prohibited as if in terms express and positive the treaty required that the accused be tried to a final conclusion on the specific charge upon which his extradition is granted and provided, further, that he shall not be arrested or brought to trial upon any other or different charge whatever, except, if at all, upon a new extradition, or unless he voluntarily relinquished his rights. *According to a very elementary doctrine of American and English jurisprudence, where a special as distinguished from a general authority is conferred by law over a person or thing, it is a denial of all other and more extensive power and authority over that person or thing.* It is this principle (the treaty being the source and measure of

the derivative and delegated authority over the person of the accused) which restricts the scope of the prosecution and the power of the prosecuting state over the accused, to the special purpose of his trial upon the specific charge on which his extradition was granted, and makes it a condition *sine qua non* of his extradition that as to any other or subsequent charge he cannot be arrested or prosecuted until the consent of the sovereignty of asylum is first obtained as an essential prerequisite to the exercise of the necessary jurisdiction over his person on the subsequent charge. This consent is to be procured only on the terms and conditions and in the cases specified in the treaty of extradition. So it is, we insist, that the power of the prosecuting state over the accused, when he is removed to its territory on extradition pursuant to the *treaty*, is circumscribed and necessarily special, limited and restricted to the specific charge on which he was extradited, and cannot lawfully extend to any other accusation—*certainly not while the extradition case is pending and awaiting trial.* It is a power conferred by the supreme law of the land, for a special purpose and the jurisdiction over the accused cannot go beyond it. The extradition is not, as most erroneously assumed by the lower courts, a general and absolute surrender of the accused to the prosecuting state, or a mere transfer of his person from the territory of one state to that of another, with the same absolute jurisdiction in the latter that belongs to it of right over all persons inhabitants of its territory. It is inherently and necessarily a special and limited transfer for a special and limited purpose, imposing on the prosecuting state the duty and ob

ligation, imperative and paramount, to confine its action and proceedings against the accused to the one specific case that was made the basis and object of his extradition. We repeat with increased emphasis that any further or different prosecution against him on a further and different extraditable charge, of an offense alleged to have been subsequently committed, prior to the expiration of his right to return to the country from which he had been forcibly taken on the preceding extradition, is only possible by consent of the sovereignty of asylum and by special authority of the *treaty* and upon the terms and conditions there prescribed, both expressly and impliedly. This can only be available after the previous extradition case is finally terminated, and the accused has returned within the required time to the protection of the laws of the country of asylum. If he fails to so return (and, of course, he must be first afforded the opportunity), he relinquishes his rights and also the asylum guaranteed him by the law of his extradition, and can then be legally prosecuted on any charge, prior or subsequent, extraditable or not. *The central controlling point is that in extradition by treaty the treaty is both the exclusive source and the exclusive measure of the power and authority of the prosecuting state over the accused in the matter of his prosecution on a criminal charge.* This rests on the broad ground of the necessity of protecting the reserved asylum, not on the narrow and special theory that the extradition only concludes what precedes it, in the nature of offenses, a theory to which there can be no objection when rightly understood and rightly restricted to its special signification.

All these various propositions are very thoroughly established in the law of international extradition and are quite fundamental. They obviously apply with especial force, as in reason they must, to prosecutions of the accused on charges of offenses alleged to have been committed subsequently to the extradition surrender, but prior to the expiration of his right to return to the country of asylum and to the protection of its laws; and are strongly prohibitive of all such prosecutions while the extradition case is pending and awaiting trial to a final conclusion. They are propositions primarily and logically predicated on the pre-existence and supremacy of the right of asylum, and on the pre-existence and supremacy of a *treaty* confirming and regulating the right by prescribing the cases in which and the terms and conditions upon which the right of asylum enjoyed by and vested in the accused is legally relinquished or abridged temporarily, and only temporarily, so as to permit and render possible his prosecution and punishment by another state for an offense alleged to have been committed against its laws, and being one of those specified in the treaty enumeration. The propositions for which we are contending are limited to extradition pursuant to *treaty*. Of course, the treaty covers only offenses actually, and therefore previously, committed, but this comprises extraditable offenses committed after the surrender in extradition and prior to the expiration of the right of the accused to return to the country of asylum; as to the prosecution of that class of offenses, the well settled principle of international law is that for all pur-

poses of arrest and criminal prosecution the accused is deemed to be physically within the territory of the country of asylum, just as fully and completely as if he had been acquitted on the extradition charge and had returned in due time to the asylum from which he had been forcibly taken on the preceding extradition, but subject, of course, to his actually returning within the required time.

Hence it is necessary to again extradite him pursuant to the *treaty* before he can be arrested and prosecuted on the subsequent charge. This well settled doctrine in the law of international jurisdiction has received an extended discussion both in the Brief and in other parts of this argument, and, therefore, we will only say at this time *that the doctrine is absolutely necessary in order to protect the asylum reserved to the accused as a condition sine qua non of his extradition*, against fraudulent or unlawful evasion and violation, and against false prosecutions on unfounded and groundless subsequent charges of subsequent offenses, perhaps specially designed merely to cut off the right of asylum and the right of the accused to return to the country of asylum in the event of his acquittal of the charge specified in the extradition; and is necessary to protect the right of asylum against all such prosecutions where they are merely a fraudulent pretext or subterfuge and have no evidence to sustain them, as was the case with the subsequent prosecution of the appellant and plaintiff in error on the indictment of December 29, 1905. To provide against all possible interference with the reserved right of asylum, such as stated, the law absolutely prohibits any and all arrest and pros-

ecution of the accused on a charge of committing a subsequent extraditable offense, until he is first given a reasonable time and opportunity to return to the country of asylum after his final release in the extradition case. If he does return within the required time, then a new extradition on the subsequent charge is an essential prerequisite to his arrest and prosecution. *The treaty clearly covers the case.*

The treaty cannot be given such an extremely narrow and unreasonable construction as to confine its operation to offenses committed previously to a given extradition; pursuing this to its logical conclusion, it would follow that if a subsequent extraditable offense was committed and the offender then returned to the country of previous asylum, he could not be extradited, which is preposterous. The *treaty* in its essential nature extends wherever the asylum extends; and this is true whether the asylum is actual or constructive in its application to a given case. *And even if, for the sake of argument, it were conceded that no asylum, not even constructively, extended in any case to the accused on a charge of committing a "subsequent offense," still this would not permit his arrest or prosecution while the preceding extradition case was pending and awaiting trial to a final conclusion, and while the extradition jurisdiction over his person existed and persisted in its exclusive control by right of its supremacy for the purpose of carrying out the sole and only object of the treaty and of the extradition*—a proposition very fully presented in the Brief and in other parts of this argument, and therefore not requiring any further

discussion at this time. The principle invoked in this respect by us is so very elementary in the law of jurisdiction that it can properly be said to be axiomatic. So, too, is the doctrine that the judgment and proceedings of a judicial tribunal, where there is either a want of jurisdiction over the person or subject-matter, are null and void in the absolute sense.

In the Brief, pages 23 to 202, all the various points we present in this argument will be found fully discussed and the authorities fully sustaining them, not only cited, but quoted at length. It will, therefore, suffice at this time to simply cite some of these authorities, referring generally to the Brief for the appropriate excerpts:

4 Lawrence's Wheaton Les Elements Du Droit International, pp. 368, 371, 503, 507.

14 Albany Law Journal, pp. 85, 88, 90, 93, 96.

16 Albany Law Journal, p. 363.

Heffter Droit International par Geffcken, pp. 145, 150.

Billot Traite de L'Extradition, pp. 308, 313.

2 Bernard Traite de L'Extradition, pp. 483, 493, 510, 516, 670.

2 Moore on Extradition, p. 1042.

Spear on Extradition, p. 205 (3d Ed.).

2 Andrews' American Law (1908), § 910.

Twiss on Law of Nations, § 223.

Hawley on International Extradition, pp. 8, 12.

2 Wharton's Digest International Law, p. 798.

Pomeroy on International Law, § 199.

1 Oppenheim on International Law, § 332.

Foreign Rel. U. S., 1876, pp. 227, 259, 278, 279, 289.

Foreign Rel. U. S., 1895, p. 492.

The Isabella, 6 Wheat., 72.

United States v. *Rauscher*, 119 U. S., 407.

Johnson v. *Browne*, 205 U. S., 309.

Cosgrove v. *Winney*, 174 U. S., 64, 68, 69.

Taylor v. *Taintor*, 16 Wall., 370.

People v. *Stout*, 81 Hun, 341.

United States v. *Watts*, 8 Sawy., 370.

Ex parte Hibbs, 26 Fed. Rep., 431.

Ex parte Baruch, 41 Fed. Rep., 472.

Bachrach v. *Lagrave*, 1 Hun, 689, 692 to 695.

State v. *Vanderpool*, 39 Ohio St., 278.

Com. v. *Hawes*, 13 Bush., 707.

Blandford v. *State*, 10 Tex. App., 638, 639.

Ex parte Begerow, 133 Cal., 349.

Having in support of our position fully presented the fundamental principles of all treaties of extradition, and particularly of the treaty of extradition between the United States and Great Britain, it only remains to point out that Congress, in enacting Section 5275 of the Revised Statutes of the United States, did so for the very purpose of maintaining these fundamental principles of the law of international extradition, and especially to protect the rights they secure to the accused—the very rights we have set up in support of our claims. In the Brief, pages 177 to 202, will also be found an extended discussion of the statute and pertinent citations of the authorities. We respectfuly refer to what is there presented, feeling confident it establishes the

correctness of our position, upon both principle and authority.

It is quite evident from the terms of the statute that the extradition custody and the extradition jurisdiction over the accused are to continue supreme and inviolate (to quote the very language of the statute), "until the conclusion of his trial for the crimes or offenses specified in the warrant of extradition, *and* until his final discharge from custody or imprisonment, for or on account of such crimes or offenses."

This in and of itself excludes every collateral arrest and prosecution of the accused *while the extradition case is pending,* on any and every charge of committing a "subsequent extraditable offense." One would think this too clear for discussion. The plain meaning of the statute is, that only on the extradition charge, and on that alone, shall the accused be held in custody; and it prohibits by a necessary implication the arrest or custody of the accused on any other and different charge, including, of course, the charge of committing a "subsequent offense."

The protection of the statute could not constitutionally extend to the accused on a charge in a state court, upon which there had been no extradition. Hence of necessity, the statute implies that the custody be confined to the specific charge on which the extradition is granted. The statute is the supreme law of the land.

The obvious import of the statute is that pending the extradition case and its trial to a final conclusion, no other power, authority or jurisdiction shall intervene, or interfere with the legal, consecutive

and regular course of judicial proceedings in the prosecution of the charge specified in the extradition process. The statute manifestly requires that the custody of the accused be used exclusively for the one purpose of his prosecution on the extradition charge, and prohibits its use for any other purpose or for the purpose of any other prosecution. *There can be but one custody and but one jurisdiction over the person of the accused; and that custody and that jurisdiction, the custody and jurisdiction of the extradition. This clearly is the meaning of the statute, or it means nothing. It is the supreme law of the land, and therefore excludes every law and judicial process of the several states, requisite to the prosecution of the accused on a subsequent charge while the extradition case is pending and awaiting trial to a final conclusion.*

We have not been able to obtain a copy of the Brief of the appellees and defendants in error, though we served upon their counsel, November 11, 1908, a copy of our printed Brief; we therefore are not in a position to apply our argument with special reference to the contents of our adversary's Brief, but there is on file a paper signed by counsel in which he very extravagantly undertakes to inform the court that all the questions we raise are really not involved, and that "the real matter to be determined by this court in these causes is whether or not, under the treaty with Great Britain (which by its terms deals only with *prior offenses*), a person who has been extradited from Canada for an extraditable offense can be tried, convicted and sentenced for another extraditable offense committed by him

in California subsequent to his extradition, and before a final determination of the case upon which he was so extradited."

In this the counsel ignores entirely Section 5275 of the Revised Statutes of the United States, just as did the state Supreme Court in its ruling that the statute does not apply. He also, like the state Supreme Court, ignores the important fact that the subsequent collateral arrest and prosecution of the accused were had and maintained *while the extradition case was pending and awaiting trial to a final conclusion and while the extradition jurisdiction over the person of the accused existed and persisted in its exclusive control in right of its supremacy, for the purpose of executing the treaty and carrying into effect the sole and only object of the extradition.* The counsel also ignores the fact that the treaty while of necessity dealing only with prior offenses in that the offense must first be committed, yet it extends wherever the asylum extends and by construction of law and as a condition *sine qua non* of every extradition, the accused is deemed to be physically within the territory of the "sovereignty of asylum" and entitled to the protection of its laws and of its asylum as against every charge and every prosecution for any offense claimed to have been committed subsequently, but before the expiration of his right to return to the asylum reserved for him, thus necessitating a new extradition pursuant to the *treaty* as an essential pre-requisite to his arrest and prosecution on any subsequent extraditable offense, unless he relinquishes the asylum reserved for him by voluntarily failing to return

within the prescribed time. The counsel also ignores the point, as did the state Supreme Court that even if it were the case that the accused could be arrested and prosecuted on the subsequent charge, without a new extradition and without first affording him an opportunity to return to the country of asylum, that still it could not legally be done while the extradition charge was pending and awaiting trial to a final conclusion and while the extradition jurisdiction over the person of the accused existed and persisted in its exclusive control in right of its supremacy, for the purpose of executing the *treaty* and carrying into effect the sole and only object of the extradition.

Every one of the *twenty-one* questions we have stated at page 16 and following of this argument arises quite properly on the record in both cases, the counsel for the appellees and defendants in error to the contrary notwithstanding.

We have already pointed out that the Supreme Court of the United States in the *Rauscher case* ultimately and quite rightly rested the decision upon the conclusive ground of want of jurisdiction over the person of the accused, and said:

> "Under the views we have taken of the case the jurisdiction of the court to try such an offense" (one *different* from that on which he was extradited) "if the party himself was properly within its jurisdiction, is not denied; but the facts relied upon go to show that while the court did have jurisdiction to find the indictment, as well as of the questions involved in such indictment, it did not have jurisdiction of the person at that time, so as to subject him to trial."

That is to say, the court possessed no jurisdiction over the person of the accused, to prosecute him or try him on the collateral charge, while the extradition case was pending and awaiting trial to a final conclusion and while the extradition jurisdiction over his person, existed and persisted in its exclusive control in right of its supremacy, for the one purpose of executing the treaty and carrying into effect the sole and only object of the extradition. And the court, after reviewing the authorities, declared it to be the *principle* that the accused could only be tried for the offense specified in the extradition proceedings, and for none other, until he had first been given a reasonable time and opportunity after his final release or trial on that charge, to return to the country from whose *asylum* he had been forcibly taken under those proceedings. Throughout its opinion, the court reasoned that the *treaty* was the source and measure of the jurisdiction over the person of the accused; that his extradition was necessarily of a special and limited nature and for a special and limited purpose; that beyond this all power was denied the prosecuting State to arrest or try the accused on a criminal charge, until at least he had been first given a reasonable time and opportunity after his acquittal or final release in the extradition case, to return to the country of asylum and failed so to do. The court was emphatic that the asylum secured was modified and abridged only temporarily and to the special and limited extent of the particular extradition, and continued for all other purposes of dealing with the accused on a criminal prosecution, as fully as if after committing another offense, he had actually

and physically returned to the country "from whose asylum he had been forcibly taken." This is unquestionably or at least indisputably the law, and results from the fundamental doctrine that the *treaty* is the source and measure of the jurisdiction over the person of the accused, for all purposes of a criminal charge, and is in its very nature simply a regulation and special limitation of the "sovereign right of asylum," modifying it only temporarily restricting its abridgement to the charge specified in the extradition, reserving and preserving it against any and every prosecution on another and different charge, except upon a new extradition, until the accused voluntarily relinquishes it by failing to return within the required time. The extradition is never a general abandonment or absolute release of the asylum secured. Say the court in the *Rauscher case:*

> "If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to another, the argument" (of general abandonment of asylum) "might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted the extradition. No such view of the solemn public treaties between the great nations of the earth can be sustained by a

tribunal called upon to give judicial construction to them."

This is simply the declaration of the principle that the treaty is the source and measure of the only permissible jurisdiction over the person of the accused for the purposes of a criminal prosecution against him. Says Spear:

> "It is to be remembered that each government assumes, as its starting point, in making an extradition treaty, that every person within its jurisdiction, and not violating its laws, is entitled, as against all the world, to the *prima facie* right of undisturbed and protected asylum. Now, neither government agrees to a withdrawal of this right in respect to any accused party, and neither agrees to place that party in the custody of the other, except upon specified conditions distinctly stated in the treaty, and for a purpose as distinctly stated in the proceedings required by the treaty; and hence it is simply monstrous to assume that these conditions and this purpose are operative only for securing the surrender, and absolutely of no effect the moment the surrender has been actually obtained."
>
> Spear on Extradition (3rd Ed.), page 205.

It is true that in the *Rauscher case*, the court refers to the collateral prosecution as being one for an offense previous to the extradition, but no stress is placed on that incidental fact, nor is the slightest significance ascribed to it; and it is evident the court in referring to it, was doing no more than applying the general principle controlling and prohibiting all collateral prosecutions whether of prior or subsequent offenses, to the concrete facts of the special case. There is nowhere the slightest indication that

the court intended to curtail, restrict or revolutionize the general principle by confining it to collateral prosecutions for "prior offenses." In formally declaring the principle the court placed no such a qualification upon it; and as justly pointed out by Professor Moore (1 Moore on Extradition, Sec. 174), it is this general statement of the principle which must be taken as the correct declaration of the law, rather than the remarks pertaining merely to the application of the principle to the special facts of the case. *No principle of the law is to be curtailed nor limited by the special facts of the case to which it applies in common with others having different incidental features.* It would be contrary to all the authorities and to the reason and purpose of the law to restrict the scope of the principle to "prior offenses." The principle in its reasons and in the necessity upon which it proceeds is applicable to all collateral criminal prosecutions, whether the offense be prior or subsequent, and this because of the decisive fact *that they are not within the special authority of the particular extradition, and hence are in derogation of and in conflict with its purpose as defined and limited by the treaty.* Accordingly, the Supreme Court of the United States, clearly states the controlling principle without restriction or qualification as to prior offenses, in the following explicit terms:

> "Upon a review of these decisions of the federal and state courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person who has been

> brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." (*United States* v. *Rauscher*, 119 U. S., 407.)

Surely if the law restricted this principle to "prior offenses" in the sense used by our adversary, and the state judiciary, the Supreme Court of the United States would have placed this qualification in its carefully worded statement of the doctrine, and not made it, as it is, sufficiently comprehensive to include every offense *different* from that specified in the extradition proceedings. Certainly Section 5275 of the Revised Statutes of the United States takes no distinction between prior and subsequent collateral offenses, and this in itself should be and is decisive. *The statute plainly makes the pendency of the extradition case, the controlling fact*, and on that basis alone, excludes every different custody of the accused "until the conclusion of his trial, for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment, for or on account of such crimes or offenses, and for a reasonable time thereafter." *These are the words of the statute;* they leave no room for doubt; and no room for engrafting upon them an absurd and nonsensical distinction between prior and subsequent offenses, or between a charge and prosecution for the one or the other.

We have heard it argued that Section 5275 of the Revised Statutes of the United States has ceased to be the law in that by implication, it has been repealed by the third article of the Convention of 1889. Aside from the great disfavor with which the law looks upon repeals by implication, it is manifest that in this instance there is no such repeal. In the first place the third article of the Convention of 1889, is merely declaratory of the pre-existing law and therefore adds nothing to the rule of decision. The maxim is *Expressio eorum quae tacite insunt nihil operatur.* Or, as Lord Coke says: "The expression of a clause which the law implies works nothing." It is, he says, *clausula inutilis* (4 Rep., 73.) That the third article of the Convention of 1889 is merely declaratory of the pre-existing law, is clearly established by the preceding ruling in *United States* v. *Rauscher*, 119 U. S., 407. In the next place, the third article of the Convention of 1889 does not cover the same ground over which Section 5275 of the Revised Statutes of the United States extends its operation. And in the third place, upon the principles asserted by the court in *Johnson* v. *Browne*, 205 U. S., 309, where the question was considered and decided, the statute has not been repealed by the Convention of 1889. If the third article of the Convention of 1889 had made express provision that the accused could be brought to trial on a subsequent offense, and prosecuted and sentenced while the preceding extradition case was pending and awaiting trial to a final conclusion (thus making the *treaty* stultify itself and defeat the very jurisdiction it had created over the person of the ac-

cused in the pre-existing extradition case), and further that such collateral prosecution if on a subsequent but extraditable offense, could also be maintained without the necessity of a new extradition, then perhaps there would be a repeal by implication, of the statute; but surely not until then. The Supreme Court of the United States in the *Rauscher case*, construed Section 5275 of the Revised Statutes as in effect providing that the accused "shall not be arrested or tried for any other offense than that with which he was charged in the proceedings, until he shall have had a reasonable time to return *unmolested* to the country from which he was brought." And Mr. Justice Gray in a specially concurring opinion resting alone on this statute, held it to mean "that the accused shall be tried only for the crime specified in the warrant of extradition, and shall be allowed a reasonable time to depart out of the United States, *before he can be arrested or detained for another offense.*" (Italics ours.) In a case decided since the Convention of 1889 went into effect, the court held explicitly that it in no way affected the operation and scope of the statute. Say the court:

> "In addition to the provisions of the treaty of 1889, we find still in existence the already mentioned sections (5272 and 5275) of the Revised Statutes, which prohibit a person's arrest or trial for any other offense than that with which he was charged in the extradition proceedings, until he shall have had a reasonable time to return *unmolested* to the country from which he was brought. * * * These sections are not incompatible with the treaty or in any way inconsistent therewith. We find

> nothing in the treaty which provides that a person shall be surrendered for one offense and then that he may be punished (or prosecuted) for another."

This was said with special reference to the Convention of 1889.

Johnson v. *Browne*, 205 U. S., 309.

The meaning of the statute is quite fully discussed by Spear in his work on Extradition, third edition, pages 126, 232 and 233; his views fully sustain our contention. Appropriate excerpts will be found at pages 188, 189 and 190 of the Brief. He also points out that the extradition jurisdiction over the accused is *sui generis* and not at all the jurisdiction of the prosecuting state, such as it possesses in the ordinary administration of its criminal law. Speaking of Section 5275 of the Revised Statutes he says:

> "No such provision would have been made if the whole case, after delivery, were simply one of municipal law, and had no relation to a custody granted by a foreign government under a treaty, and involved no obligation in respect to the use thereof. The theory of the legislation is that the United States, in obtaining the extradition of a fugitive criminal, acquires no more power over his person than that which results from the treaty."

Spear on Extradition, page 233.

The latter proposition to the effect that the power of the prosecuting state over the accused is derivative and special is decisive of the question. In a case in New York the court place a similar construction on Section 5275 of the Revised Statutes, and say:

> "Before the supplemental treaty of 1889 was made, that of 1842 was in many cases so construed as not to permit the trial of a person delivered up in execution of the trial of a person delivered up in execution of the treaty, for any offense other than that for which he was extradited, while his custody, taken by such surrender, continued. And such is the import of the federal statute on the subject."
>
> *People* v. *Stout*, 81 Hun., 339.

This, too, is the view accepted by the Supreme Court of the United States:

> "The general scope of the two treaties," say the court, "makes manifest an intention to prevent a state from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then, having obtained possession of his person, to use it for another and different purpose."
>
> *Johnson* v. *Browne*, 205 U. S., 309.

All these doctrines rest ultimately upon the principle that the *treaty* is the exclusive source and measure of the power of the prosecuting state over the accused, for all purposes of a criminal prosecution; that the extradition is special and for a special and limited purpose, precisely defined and previously ascertained, and that as to any and every charge or prosecution different from the one authorized by the extradition, the accused is by construction of law deemed physically to be within the territory of the country of asylum and therefore beyond the power of the prosecuting state to subject him to arrest or trial on the collateral charge, except upon a new extradition or voluntary waiver of his rights. A leading and very distinguished authority on the law of extradition, after stating in the

most positive and unqualified terms the general principle

> "that an extradited person cannot be tried for anything else but the infraction for which his extradition has been granted. It is incontestable that the tribunals can try the accused only on the facts for which the extradition has been accorded. This rule is an immediate corollary from the principle which imposes on the judiciary an obligation to apply the treaties of extradition,—a principle which itself is a direct consequence of the higher principle of the separation of powers. The rule and principle belong to the very organization of political societies and must have precedence over every internal law. It is, besides, a condition *sine qua non* of the very principle of extradition,"

says with great precision:

> "The engagements taken by a government not to permit the extradited to be tried on any charge but the one on which his extradition was granted must be interpreted in this sense—that he shall be considered absent respecting all prosecutions not covered by the extradition."
>
> *Billot Traite de L' Extradition*, pages 308 and 313.

To the same effect, see:

> Heffter Du Droit International par Geffcken, page 156.
>
> Foreign Rel. U. S., 1876, pages 227, 259, 279.
>
> 2 Moore on Extradition, page 1042.
>
> 16 Albany Law Journal, page 363.

Mr. Lawrence says:

> "When the extradition of an individual is granted by one nation to another, the protection of the foreign asylum to the accused party

> is only impaired to the extent expressed in the warrant, and that, for the cases not excepted or provided for in the convention, and for all other purposes, the person surrendered is to be deemed still legally in the country from which he was extradited; or, as stated in a recent treatise on extradition, 'the fiction according to which, for every fact foreign to the extradition, he is still in the territory of the country of refuge, must be completely respected; and if an offense is brought to notice in the course of the proceedings the results must be the same.' (*Vazelhas Etudes d' Extradition*, page 155.)"
>
> 16 Albany Law Journal, page 363.

This statement of the law, directly applies to the second charge of perjury, or it is meaningless.

Professor Moore after stating that the asylum is abridged by extradition, only to the special extent of the specific charge on which it is granted, says:

> "As to other offenses, he is to be considered as being still within the state from which he was taken, and as being entitled to return to that state before being tried for any such offense."

This is manifestly in point.

> 2 Moore on Extradition, page 1042.

If the "subsequent offense" is extraditable, he cannot be arrested or put to trial without a new extradition. The following is decisive:

> "If after the extradition is obtained, a *new* crime is discovered, a *new* demand of extradition must be made and accorded before the person can be prosecuted or punished for the *new* crime."
>
> 4 Lawrence's Com. sur. Wheaton, page 507.

2 Bernard Traité de L'Extradition, page 516.

Foreign Rel. U. S., 1876, page 278, 287.

The principle for which we are contending is the necessary result of the fundamental doctrine of inviolability of asylum. Thus, Bernard states the law in the following terms:

> "The extradited person must not be tried on any charge but the one for the infraction which constitutes the object of the extradition. This principle is founded on the right of sovereignty of the country of asylum." (2 Bernard Traité de L'Extradition, page 483. See, also pages 493, 510, 670.)

Hefftter Droit International, par Geffcken, page 150, is to the same effect.

All such elucidating explanation of the principle presents forcibly the reason of the law, and serves to make emphatic and more pointedly significant the exemption of the person of the accused from all arrest on charges and prosecutions not authorized by the specific extradition. As to all such charges and prosecutions there must be a new extradition if the offense be extraditable, unless the accused has voluntarily relinquished the protection of the asylum reserved to him, by failing to return within the time required. Such subsequent offenses are well within the *treaty* and necessarily will precede the extradition authorizing their prosecution. As already pointed out, the *treaty* is always co-extensive with the scope of the asylum, actual and constructive, limited only by the offenses enumerated, and the terms and conditions upon which, by its authority, the extradition is granted. The *treaty* is primarily concerned with

the "sovereign right of asylum," not at all with the entirely irrelevant question as to whether the offense for which the extradition is legally granted is a subsequent offense, as related to a specific preceding extradition. In this special sense all offenses for which extradition is permitted are prior offenses, as they all must precede the particular extradition embracing them. This is literally true of "subsequent extraditable offenses," for which a new extradition is requisite before the accused can be arrested or prosecuted. The treaty is always applicable to *such* offenses, where the reserved right of asylum is constructively and by operation of law, extended to the accused.

The one special purpose of the doctrine placing the extradited accused by construction of law in the country of asylum as to all charges, arrests and prosecutions for offenses not within the particular extradition, is to prevent his arrest and prosecution on a subsequent charge of subsequent offense, while the extradition case is pending and awaiting trial. The necessity for this is the necessity for protecting and maintaining both the extradition jurisdiction over the accused and the asylum reserved to him as a condition *sine qua non* of his extradition.

These suggestions are made in answer to the contention of our opponents that as the *treaty* "by its terms deals only with prior offenses," it cannot extend to subsequent extraditable offenses. If this were the case, the offender could not be extradited if perchance he returned to the country of asylum after committing the subsequent offense. The absurdity of a contention that leads to such a result

is manifest. *Then, too, beyond this, the point remains, that even if it were true that the treaty does not extend to "subsequent offenses," and that, therefore, the accused may be arrested and prosecuted without first obtaining a new extradition, this clearly cannot be done while the extradition case is pending and awaiting trial to a final conclusion and while the extradition jurisdiction over the person of the accused exists and persists in its exclusive control by virtue of the supreme law of the land, and for the one purpose of carrying out the sole and only object of the extradition, as required by the treaty, his trial to a final conclusion and within a reasonable time, on the charge upon which he has been extradited.* This is the plain legal effect of both the treaty and Section 5275 of the Revised Statutes. A trial on any other charge would necessarily be in conflict with the obligation imposed by the supreme law, and manifestly be an invasion of the extradition jurisdiction over the person of the accused.

The local laws and judicial process of the subordinate state, cannot be made to prevail over the supreme law of the land.

As to the requirement of a new extradition as a pre-requisite to the prosecution of the accused on the subsequent charge of committing a subsequent extraditable offense, we want to say in conclusion that the necessity for it is manifest. There is the reserved right of asylum to be protected against interference or impairment by means of unfounded and fraudulent prosecutions on subsequent charges; the power to extend the needed protection is quite

properly lodged *exclusively* in the sovereignty whose asylum the accused has been guaranteed as a condition *sine qua non* of his extradition. The exercise of the power in a given case is regulated by the *treaty* governing extraditions, which in principle, as we have seen, is the source and measure of the requisite authority to subject the accused to arrest and trial on a criminal charge.

IV.

LIMITATION AS TO TIME WITHIN WHICH EXTRADITION CASE MUST BE PROSECUTED.

It is submitted we have established to a demonstration that upon both principle and authority, the arrest, trial, judgment and sentence of the appellant and plaintiff in error, on the second charge of perjury, and on its indictment of December 29, 1905, are in glaring violation of the Treaty of Extradition between the United States and Great Britain, and of Section 5275 of the Revised Statutes of the United States, of international law, and of Section one of the Fourteenth Amendment and Article 6 of the Constitution. It results that the imprisonment, so far as it exists, by virtue of the void proceedings on the second indictment, is unlawful, and *habeas corpus* is the appropriate remedy. The only other question arising is as to the validity of the imprisonment under the warrant of extradition. We insist that the imprisonment in that behalf is also unlawful, and also in violation of the *treaty* and of Section 5275 of the Revised Statutes of the United States, and of international law, and of the Consti-

tution. We contend that by the law of international extradition, the extradited accused must be brought to trial to a final conclusion, on the charge specified in the proceedings, *within a reasonable time*. We insist that this in law places a necessary limitation on the life of the warrant of extradition, for otherwise it would authorize the perpetual imprisonment of the accused, without a trial. What constitutes a "reasonable time," is a question of law that will ordinarily be determined by analogy to the *lex fori*, in this case the law of the State of California, which prescribes a limitation of sixty days after the disagreement of the jury, and this occurred on December 22, 1905; there has been no trial of the extradition case since then, nor any effort made in that direction by the prosecution, although the accused has at all times insisted on trial and objected to all postponements; trial has been absolutely and arbitrarily refused by the State Court. It is now more than *three years* since the jury disagreed, and the accused is still being imprisoned without trial, on the extradition charge. In the opening statement of this argument, we have presented all the essential facts on the point, with the pertinent references to the record, and we at this time simply urge what is there stated. It is manifest from the facts disclosed by the record, that the case has been abandoned and its prosecution discontinued. This resulted from the action of the state authorities in substituting the prosecution of the second accusation in the place of the extradition case.

It is of the very essence of the protection extended

to the accused by the law of the extradition that he be given a trial to a final conclusion within a reasonable time. Without this requirement, all the rights conferred upon him by the *treaty* and by Section 5275 of the Revised Statutes of the United States, would be absolutely worthless. The law of the extradition does not in terms define what constitutes a reasonable time, except to require that the extradition charges be prosecuted with due diligence, to a final conclusion, with the right vested in the accused, to his discharge from imprisonment, if his prosecution be unreasonably delayed. (Hawley on International Extradition, page 12.) Much must be left to the law of the tribunal having authority to hold trial of the charge.

This question as to the limitation of "reasonable time" and the question as to the right of an accused person to his discharge on *habeas corpus*, where the limit has been exceeded, were very fully and learnedly discussed and considered by the Supreme Court of California in *Ex Parte Begerow*, 133 Cal., 349, and the conclusion reached that it was a violation of the law to imprison the accused without trial, for more than sixty days after the disagreement of the jury, and that he was entitled to his discharge on *habeas corpus*. It was a case where the prisoner was charged with murder. The court held that it was not only contrary to the statute and the constitution, but also contrary to Magna Charta, and not "due process of law" to imprison the accused without trial, an unreasonable length of time.

We insist that it is a necessary implication of the

treaty and of Section 5275 of the Revised Statutes of the United States that the extradited accused be brought to trial to a final conclusion of the case, within a *reasonable time*, or be discharged from imprisonment. The duty to prosecute is imposed on the state authorities, not on the accused; and if there is good cause for an apparently unreasonable delay, it is incumbent on the prosecuting state to establish it affirmatively on the face of the record. So held in *Ex Parte Begerow*, 133 Cal., 349. There was no good cause for the exceedingly monstrous delay in our case, and none was attempted to be shown. The point has already been sufficiently discussed in the brief, page 35, and following. Also page 91.

The fact that the second charge and its indictment of December 29, 1905, were brought to trial within sixty days after the disagreement of the jury in the extradition case, is conclusive that the latter could have been brought to trial within that period of time. The record shows affirmatively that the extradition case could have been brought to trial in January or February, March or April, 1906, or at any time thereafter. Since then, many times sixty days have elapsed without trial. We respectfully refer to the facts set forth on this point, in the opening statement of this argument; they fully sustain our contention. *It is ridiculous to say that the law permits the perpetual imprisonment of the accused; and it is equally ridiculous to maintain that imprisonment without trial for three years and more is not unlawful.* It follows that by reason of the fact the extradition case has not been brought

to trial within a reasonable time, to a final conclusion, the warrant of extradition has expired by limitation of law, and the imprisonment under it is consequently illegal.

Nor does the warrant of extradition confer any authority on the sheriff. It does not run to him and the record shows he was never appointed by the United States to hold the custody. The point has been sufficiently discussed in the brief and elsewhere in this argument. It is by virtue of the existence of the warrant of extradition that the United States exercises over the accused the power and authority conferred by Section 5275 of the Revised Statutes; and for that all important purpose it is essential that the person holding the custody of the accused be appointed by the United States and the warrant expressly so requires.

V.

THE INTERNATIONAL WARRANT OF EXTRADITION AS THE ONLY LAWFUL AUTHORITY FOR THE CUSTODY.

The custody of the accused is exclusively governed by the international warrant of extradition. The law of the extradition imports into the warrant all the terms and conditions on which the accused has been extradited, as fully as if set forth in words. The law is a part of the warrant, to the same extent exactly as if written into its provisions. What, then, are the terms of the warrant as thus interpreted? Manifestly,

> "that the accused shall be held in custody for the sole and only purpose of giving him a trial

to a final conclusion, and within a reasonable time, upon the specific charge herein designated and upon which his extradition is granted; and upon no other charge shall he be arrested or brought to trial, until after he has first been given a reasonable time and opportunity subsequently to his final release or trial upon said charge on which he is extradited, to return to the country granting his extradition, and has failed so to do. And provided, further, that at no time prior to said expiration of his said right to return shall he be imprisoned, prosecuted or placed on trial for or on account of any charge whatsoever other than the said charge in this warrant designated, and for which and upon which the said extradition has been granted."

It follows that these terms and conditions of the international warrant of extradition, implied by law, are violated by the imprisonment of appellant and plaintiff in error, in this: In the first place, he has not been given a trial of the extradition case to a final conclusion within a reasonable time, but is being perpetually imprisoned on the charge upon which he was extradited and without trial; and in the next place, he has been arrested, prosecuted, convicted and sentenced on a charge altogether different from the one on which he was extradited, and this, too, while the extradition case was pending and awaiting trial, and while the extradition jurisdiction over his person existed and persisted in the full force and effect of its exclusive control in virtue of the supremacy of the law creating it, for the purpose of carrying out the sole and only object of the *treaty*—his trial to a conclusion and within a reasonable time on the specific charge described in the extradition proceedings. Although the United

States maintained in the *Lawrence* and *Winslow cases* that the person extradited may legally be arrested and tried on any charge, yet this was always held subject and subordinate to and qualified by the well established and always recognized rule that the extradition charge must *first* be brought to trial to a final conclusion, before the accused could be arrested or prosecuted on any other and different charge. In the Brief, at page 98 and following, this contention of the United States is fully discussed, and the precedents in course of diplomatic correspondence, are there cited in reference to the point.

Our position that the extradition case must *first* be brought to trial to a conclusion, and to the exclusion of every different charge, and within a reasonable time, is based primarily upon the supremacy of the law of the extradition, the treaty and Section 5275 of the Revised Statutes, over all the laws, judicial proceedings and process of the State of California, by virtue of Article 6 of the Constitution, thus making the incidental and resulting obligation imposed on the state to first obey the supreme law, one of paramount and supreme force. This special point, we may say in passing, did not arise in *United States* v. *Rauscher*, 119 U. S., 407, nor in *Cosgrove* v. *Winney*, 174 U. S., 64, nor in *Johnson* v. *Browne*, 205 U. S., 309, as they did not originate in the state courts, though it always has been the doctrine of international law required by the necessity of maintaining the complete integrity of the treaty, that the prosecuting state must first obey the law of the extradition in proceeding against the accused, and could not hold in check or intercept, in-

terfere with, obstruct nor postpone the due course of the extradition case in its regular and normal progress to a trial to a final conclusion, by arresting and prosecuting the accused on another and different charge, while the extradition case was pending and awaiting trial. Billot, who is universally recognized to be the leading and most distinguished authority on international extradition, says that this principle "must have precedence over every internal law." (Billot Traité de L'Extradition, page 308.) There can scarcely be the slightest doubt of this being the law. The prosecuting state would be powerless to proceed against the accused at all if it were not for the law of the extradition. It therefore has no power after availing itself of the enabling authority of this law to repudiate the incidental obligations the law imposes, and then substitute the local law and judicial process in another case, and in another prosecution,—a thing quite impossible if there had been no extradition.

> "The treaties," says Lawrence, speaking of extradition, "are obligatory on the component states as well as upon the nation. They control the law, the power of the legislature and the power of the judiciary, in the sense that an interior law cannot hold in check a stipulation of a regular treaty." (4 Lawrence's Com. sur Wheaton on International Law, page 503.)

This applies to stipulations implied as well as express and to all the obligations imposed by the extradition. And in any event, irrespective of international law, Article 6 of the Constitution of the United States is decisive of the question. *It is impossible therefore that the State of California possess any power to arrest or prosecute the accused*

on a subsequent charge of "subsequent offense" while the extradition case was pending and awaiting trial to a final conclusion and while the extradition jurisdiction over his person existed and persisted in the full force and effect of its exclusive control by virtue of the supreme law of the land for the one purpose of carrying into execution the provisions of the treaty and in that behalf effectuating the sole and only object of the extradition,—the trial of the accused to a final conclusion and within a reasonable time on the one specific charge on which he was extradited. This is the law even if it were true (and it is not), that the state may prosecute on a subsequent extraditable offense, without the necessity of a new extradition and without first affording the accused a reasonable time and opportunity to return to the country of asylum from which he had been forcibly taken on the preceding extradition. In the presence of the supreme law of the land, the laws and judicial process of the State of California necessary for the jurisdiction to arrest and prosecute the accused on the subsequent charge of subsequent extraditable offense, are as silent and inoperative for the time being, as if they never existed. It is a maxim of universal jurisprudence that *In praesentia majoris cessat potentia minoris.* As said in our Brief:

> "There can be no jurisdiction over the person without a law conferring it. If there are two 'laws' purporting to confer jurisdiction, and over the same person, one of these laws supreme, the other not, *there is but one jurisdiction, and that the jurisdiction of the supreme law.* The scope of its authority is an entirety and indivisible, for supremacy is necessarily

> entire and omnipotent within the sphere of its legitimate control. To permit an inferior law to exert authority in dominion over the subject assigned to the control of the supreme law, is to subvert the supreme law, and invade the domain of its exclusive jurisdiction. We say its 'exclusive jurisdiction' for if it is concurrent or subordinate, then the law is not and cannot be supreme. Even a concurrent jurisdiction becomes exclusive when it is the first to become vested either over the person or the subject-matter. The jurisdiction over a person extradited pursuant to *treaty*, is in its every aspect and operation, necessarily *sui generis*, and is not the ordinary or local jurisdiction which the prosecuting state possesses in the usual administration of its local criminal law."

Since this is all of it very self-evident, it is quite inexplicable how any one could have thought that the prosecuting state possessed the right of election as to different charges, where one is the basis of an international extradition and the other not. Says Spear in commenting on the meaning of Section 5275 of the Revised Statutes of the United States,

> "The fact that the president is authorized to protect the fugitive against lawless violence until the conclusion of his trial, and until his discharge from custody or imprisonment, and 'for a reasonable time thereafter,' shows that Congress regarded the case as a special one not falling into the ordinary category of persons arrested, tried and punished for crime. No such provision would have been made if the whole case, after the delivery, were simply one of municipal law, and had no relation to a custody granted by a foreign government under a treaty, and involved no obligation in respect to the use thereof. The theory of the legislation is that the United States, in obtaining the extradition of a fugitive criminal, acquires no

more power over his person than that which results from the treaty." (Spear on Extradition, 3rd Ed., pages 232, 233.)

This conclusion logically follows from the principle that the *treaty* is a special regulation of the pre-existing asylum secured by the accused, modifying or restricting it only to the limited extent of the particular extradition in a given case, and confirming it and perpetuating it for the benefit of the accused as against every charge and every prosecution not authorized by the particular extradition proceedings, thus prohibiting all arrests and prosecutions on so-called "subsequent offenses," except upon a new extradition, or when the accused waives his rights. In other words, the treaty is the exclusive source and measure of the power of the prosecuting state over the accused, for all purposes of a criminal prosecution on any charge. The right of asylum is not only conferred for the protection of political offenders, but as well for the protection of all persons victims of oppression or persecution in the lawless exercise of the powers of government, whether by means of the criminal law of the local jurisdiction or by any other method that may be pursued, to gratify private malice or personal vengeance. This right of asylum is established beyond all controversy, both by the common law and by the law of nations, irrespective of whether the accused is or is not a political offender. It is an inviolable guaranty of the common law.

Says Lawrence:

"The extradition by a country of its citizens and also of foreigners who are refugees therein, confident in the right of asylum, a right which

> is an inviolable attribute of all independent sovereignty, has no place in the common law, upon which the American and English have always relied for the protection of their persons, their liberty and their property." (4 Lawrence's Com. sur Wheaton Les Elements Du Droit International, pages 368, 371; 14 Albany Law Journal, page 88.)

It is also an inviolable guaranty of international law.

> "All independent states," says Heffter, "offer on their territory a natural asylum not only to their own subjects, but also to foreigners, as to the prosecutions coming from other nations against them. * * * The individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes, would be to violate the mutual principle of asylum and the silent clause contained by implication in every extradition." (Heffter, Droit International, par. Geffcken, pages 145, 150.)

Here we have the true view of the prohibition in its origin and reason as being exclusively related to the asylum reserved to the accused,—a condition *sine qua non* of every extradition; and showing its primary and essential purpose to be the protection of the reserved asylum and of the right of the accused to revert to that asylum on the termination of the extradition case and upon his final release from custody under the international warrant. This renders the prohibition in the reason and purpose of its existence, forcibly applicable to a collateral arrest and prosecution on a subsequent charge of subsequent offense. And Bernard places the prohibition on the same basis. He says:

> "The extradited person must not be tried on any charge but the one for the infraction which constitutes the object of the extradition. This principle is founded on the right of sovereignty of the country of asylum."

And the same distinguished authority says further on in his exhaustive and learned treatise:

> "Mr. Billot is of the opinion that the judicial power must not proceed to try the extradited person, where a new crime is discovered since the extradition. This means it cannot be done except by opening negotiations, so as to obtain an extension of the extradition."

This is directly in point.

> 2 Bernard Traité de L'Extradition, pages 483, 493, 510, 516, 670.

The logical and ultimate conclusion is and must be that as the *treaty* is simply a special regulation of the pre-existing asylum, it is of necessity the sole and only source of the power and measures the extent of the power of the demanding state over the person of the extradited accused, for all purposes of a criminal prosecution, and prohibits every arrest and every prosecution which is not authorized by the particular extradition, reserving to the accused the right of asylum as to all charges of offenses subsequently committed and placing him constructively in the territory of the sovereignty of asylum as against all such charges, thus necessitating a new extradition if they are extraditable, thereby conserving and protecting so far as is necessary, the right of asylum, the very foundation itself, and the dominant policy of the law of international extradition, to which all its doctrines, principles and rules are quite rightly

made subservient, and promotive, as well as protective.

It is the conclusion required by the well established principles of the law, that for the reasons we have given in the Brief and in this argument, the imprisonment of the appellant and plaintiff in error is in all its features, claims and pretensions, in violation of the Treaty of Extradition between the United States and Great Britain, in violation of Section 5275 of the Revised Statutes of the United States, in violation of international law, in violation of Section one of the Fourteenth Amendment, and of Article 6 of the Constitution of the United States.

It results that the judgments, respectively, of the Supreme Court of California and of the United States Circuit Court for the Northern District of California, should be *reversed* and suitable direction given that the appellant and plaintiff in error be restored to his liberty. The case is respectfully submitted.

GEORGE D. COLLINS,
Counsel for Appellant and for the Plaintiff in Error.

Dated at the City of Washington, in the District of Columbia, the fifth day of April, in the year of our Lord one thousand nine hundred and nine.

Office Supreme Court, U. S.
FILED.
DEC 26 1908
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

GEORGE D. COLLINS,
Appellant,
vs.
THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA,
Appellees.

No. 320.
OCTOBER TERM, A. D. 1908.

Motion to Advance Cause No. 241, October Term, A. D. 1908, and also Cause No. 320, October Term, A. D. 1908, to be Heard and Determined Together.

GEORGE D. COLLINS,
COUNSEL FOR APPELLANT.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

GEORGE D. COLLINS, *Plaintiff in Error,* *vs.* THOMAS F. O'NEIL, the Sheriff of the City and County of San Francisco, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA, *Defendants in Error.*	No. 241. OCTOBER TERM, A. D. 1908.
GEORGE D. COLLINS, *Appellant,* *vs.* THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA, *Appellees.*	No. 320. OCTOBER TERM, A. D. 1908.

Motion to Advance Cause No. 241, October Term, A. D. 1908, and also Cause No. 320, October Term, A. D. 1908, to be Heard and Determined Together.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States and to the Court:

Comes now GEORGE D. COLLINS, the plaintiff in error and appellant, respectively, in the above entitled

causes and presents to you this, his motion, that the said causes now pending in your Honorable Court, and involving his right to his discharge from existing imprisonment, on *habeas corpus*, be ordered advanced upon the docket of the court to an early hearing, and be heard and determined together. In this behalf and to the end that this motion be granted the plaintiff in error and appellant respectfully urges upon your consideration, that on the record before you, in each of said causes, the following questions are raised, viz.: 1. In a case of international extradition, can the accused be arrested, brought to trial, prosecuted and convicted on a charge entirely different from that upon which he has been extradited? Can he be extradited on one charge and tried on another? Where a person is extradited pursuant to the treaty between the United States and Great Britain, upon a specific and described charge of perjury, can the prosecuting state legally use and divert the custody thus acquired and specially entrusted in execution of the treaty, to the entirely different purpose of prosecuting the accused to trial, conviction and sentence upon another and altogether different charge of perjury, and do this, too, while the extradition charge is pending and awaiting trial to a final conclusion, and in exclusion and in substitution of the extradition case? 2. Is the pre-existing *extradiction jurisdiction* over the person of the accused supreme and exclusive over all other jurisdiction of his person, until the expiration of the time specified in Section 5275 of the Revised Statutes of the United States? 3. Can the accused be legally prosecuted to trial and con-

viction on a charge *different* from the one upon which he was extradited, without first affording him a reasonable time and opportunity to return to the country of asylum? 4. It being the well settled principle of international law as well as of the treaty and of the Federal statute that if pending the final trial and determination of the charge on which the accused was extradited, and prior to the expiration of his right to return to the country of asylum, he commits another offense extraditable in character, he can only be prosecuted and brought to trial on the latter, by virtue of a *new* extradition, where he has not waived his right to return to the country granting the extradition, can this principle of international law be successfully evaded by prosecuting him on the subsequent charge *before* the charge on which he has been extradited is given a trial to a final conclusion, and while it is still pending and while he is still held in custody under the supreme and exclusive authority of the international warrant of extradition? Does this alone control the jurisdiction over his person and to the exclusion of every different prosecution? 5. Can the right to return to the country of asylum on the acquittal and final release of the accused upon the extradition charge, and therein his right necessarily arising to *first* be given for that paramount purpose a trial to a final conclusion on the charge upon which he was extradited, be legally postponed or interrupted, intercepted, or interfered with, by prosecuting him to trial, conviction and sentence on another and different charge, to wit, of having committed a subsequent offense? and if so, can such prosecution be

maintained while the extradition case is still pending and awaiting trial to a final conclusion, and while the jurisdiction over his person is restricted and confined to the supreme authority of the warrant of extradition? 6. Would the arrest, trial and prosecution on a subsequent charge of committing a subsequent offense, if occurring and maintained *while the extradition case is pending* and awaiting trial to a final conclusion, and in exclusion of the extradition case, be a violation of the extradition jurisdiction and of the treaty? 7. Would such arrest, trial and prosecution be a violation of Section 5275 of the Revised Statutes of the United States? 8. Would such arrest, trial and prosecution be in contravention of the supreme and pre-existing extradition jurisdiction over the person of the accused, and in violation of the said treaty and of Section 5275 of the Revised Statutes of the United States, and is such extradition jurisdiction existing for the sole purpose of executing the treaty, *supreme and exclusive*, until it has wrought its function? Can the prosecuting state, having acquired the custody of the accused on the faith alone of the extradition, for one specific purpose, use the custody thus entrusted in execution of the treaty *to another and different purpose, not authorized by the treaty?* 9. Can the prosecuting state legally intercept the due execution of the treaty and the regular course of the extradition case, in its orderly progress to a final conclusion, and supersede the due execution and enforcement of the treaty, and cut off the right to return to the country of asylum, by arresting and prosecuting the accused on another and differ-

ent charge? 10. If the accused is not brought to trial to a final conclusion *within a reasonable time* upon the charge on which he was extradited, does the indictment thereby become null and void and is he entitled under the treaty and the Federal statute to his discharge on *habeas corpus?* And is the period of three years and more a reasonable time, especially in view of the fact that the law of the prosecuting state fixes *sixty days?* 11. Can the prosecuting state lawfully drop and discontinue the prosecution of the extradition case, after getting possession of the accused, on the faith alone of the extradition and on the faith alone of the promise to give him a trial to a final conclusion on the charge upon which his extradition was granted, and permit him to return unmolested and depart in peace to the country of asylum, when acquitted, and *substitute* in its place and stead while the extradition jurisdiction still exists, and still persists in the full supremacy of its exclusive control over the person of the accused, for the sole purpose of executing the treaty, another and different prosecution on another charge, and thereby deprive the accused of the fundamental rights conferred upon him by the treaty, by Section 5275 of the Revised Statutes of the United States and by international law? 12. Has the sheriff of San Francisco any power to imprison the accused under the extradition warrant, the latter expressly restricting its authority to the person appointed by the United States and the sheriff never having been so appointed? All these questions are based upon and sustained by the printed record now before your Honorable Court in each of said causes, affirmatively showing that the appellant and the

plaintiff in error did not at any time waive his rights, but on the contrary at every stage of the proceedings insistently asserted them and interposed at every step his objection and protest, invoking in that behalf the Treaty of Extradition between Great Britain and the United States, and Section 5275 of the Revised Statutes of the United States and the well settled principles of international law pertaining to said questions. That the printed Brief and Argument of appellant and plaintiff in error, on file herein, and consisting of 203 pages, fully presents the principles and cites the authorities on all said questions, and establishes beyond doubt that his imprisonment is in violation of said treaty and of said Federal statute, and of international law. That plaintiff in error and appellant is actually imprisoned by the sheriff of the City and County of San Francisco, State of California, in the county jail of said city and county, and upon no other claim than that of the warrant of extradition and the collateral judgment of conviction hereinafter mentioned; and he is seeking herein to obtain his release and discharge from said imprisonment upon *habeas corpus* and on the grounds that said imprisonment is in violation of the said Treaty of Extradition and of Section 5275 of the Revised Statutes of the United States and of international law. That appellant and plaintiff in error was upon demand of the United States extradited on the 16th day of October, A. D. 1905, pursuant alone to the said Treaty of Extradition, from the Dominion of Canada upon a specific charge of having, on the 30th day of June, A. D. 1905, committed in the City and County of San

Francisco, State of California, the crime of perjury in verifying by his oath the general issue presented by his plea and answer to a complaint filed in a civil suit then pending against him in the Superior Court of the State of California in and for said City and County of San Francisco. That said civil suit never has been brought to trial, nor otherwise disposed of. That the said charge on which he was extradited has never been brought to trial to a final conclusion, but on the contrary and over his objection has been by said State of California and said Superior Court *indefinitely postponed*. That he is nevertheless still imprisoned under the warrant of extradition by said sheriff and in said jail. That said warrant of extradition is in the record, and bears date and was issued on October 16th, A. D. 1905. That notwithstanding the pendency of said extradition case before said Superior Court and awaiting trial to a final conclusion the State of California, on the 29th day of December, A. D. 1905, and against his protest, arrested appellant and plaintiff in error upon an indictment filed in said Superior Court on that date, purporting to charge him with committing another and different offense of perjury, to wit, subsequently to his surrender and in said extradition proceedings and while said extradition case was pending; and said State of California, despite his protest based upon and invoking said treaty and said Section 5275 of the Revised Statutes of the United States and international law, arrested and prosecuted him to trial and conviction, to judgment and sentence on said second charge of perjury, to the exclusion of said extradition case,

and while the said extradition case was still pending before said Superior Court and awaiting trial, and remained undisposed of either by trial to a final conclusion or otherwise; that said extradition case is still undisposed of. That he was by the judgment of said Superior Court sentenced to imprisonment for *fourteen years* in the penitentiary of said State of California on said second perjury charge. That said sentence is final but void, and said sheriff also imprisons appellant and plaintiff in error in said county jail, under said sentence and pending its execution. That after said judgment and sentence, the appellant and plaintiff in error sued out and was granted in the Supreme Court of the State of California, the writ of *habeas corpus* for his release and discharge from said imprisonment, on all of the grounds heretofore stated, and on said *habeas corpus* raised each of the questions hereinabove enumerated, but said court decided all said questions adversely to him and by its judgment expressly remanded him to the custody of said sheriff as existing when said writ of *habeas corpus* was granted, and *to be held by said sheriff in custody upon said warrant of extradition and upon said judgment and sentence on said second charge of perjury;* and said sheriff has ever since imprisoned and does now accordingly so imprison appellant and plaintiff in error, in said county jail, and for no other cause now upon any other claim or pretense. That the said judgment of said Supreme Court of California is final. That a writ of error was duly sued out and allowed him, from the Supreme Court of the United States to the Supreme Court of the State of Cali-

fornia on said judgment in said *habeas corpus* case. That said writ of error and the citation thereon have been duly served and filed, and the case on said writ of error has been docketed and the record filed and printed in the Supreme Court of the United States, and is there pending and awaiting hearing and determination, and is numbered 241, October Term, A. D. 1908. That the printed brief and argument of appellant and plaintiff in error, consisting of 203 pages, have been filed in said cause No. 241, and also in said cause No. 320, October Term, A. D. 1908, which is an appeal taken and prosecuted by the said George D. Collins, from the final judgment and decree of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California, refusing to grant him, the said appellant, on the facts above stated, the writ of *habeas corpus* for his release and discharge from said imprisonment on the same grounds hereinbefore set forth, and presents the same questions as are presented on said writ of error. That said appeal was duly taken and allowed and citation served; and thereafter the case on said appeal was docketed and the record filed and printed in the Supreme Court of the United States, and is numbered 320, October Term, A. D. 1908, and the case is now pending and awaiting hearing and determination in your Honorable Court.

That upon the facts presented in the said records respectively in each of said cases the said and existing imprisonment of appellant and plaintiff in error is unlawful and in violation of said Treaty of Extradition and of Section 5275 of the Revised Statutes of the United States and of international law; and

he is therefore entitled to a reversal of each of said judgments of the State Supreme Court and the United States Circuit Court respectively, and to his restoration to liberty. That he has been refused bail. That these motions are based upon the foregoing facts and upon said record on file in your Honorable Court in each of said causes, and on said Brief and Argument of appellant and plaintiff in error, on file therein. That the said Brief and Argument have been served upon and a copy delivered to the counsel for said appellees and said defendants in error.

WHEREFORE plaintiff in error and appellant respectfully presents to your Honorable Court these his motions, that said causes numbered as hereinbefore stated, to wit: No. 241, October Term, A. D. 1908, and No. 320, October Term, A. D. 1908, be by your Honorable Court ordered advanced to an early hearing and heard and determined together.

GEORGE D. COLLINS,
Counsel for Appellant and
for Plaintiff in Error

Dated January 18th, A. D. 1909, at the City of Washington, in the District of Columbia.

CERTIFICATE OF COUNSEL.

UNITED STATES OF AMERICA. } ss.

This is to certify that the undersigned, an attorney and counsellor-at-law of the Supreme Court of the United States, has carefully prepared and examined the foregoing motions, and that the matters therein set forth are well founded in fact and in law, and that the facts therein averred and therein recited, are true of his own knowledge.

GEORGE D. COLLINS,
Attorney and Counsellor-at-Law.

Dated January 18, A. D. 1909, at the City of Washington, District of Columbia.

IN THE SUPREME COURT OF THE UNITED STATES.

George D. Collins,
Plaintiff in Error,

vs.

Thos. F. O'Neil, the sheriff of the City and County of San Francisco, the People of the State of California, and the State of California,
Defendants in Error.

No. 241
October Term
A. D. 1908.

George D. Collins,
Appellant,

vs.

The Sheriff of the City and County of San Francisco, the People of the State of California and the State of California,
Appellees.

No. 320
October Term
A. D. 1908.

NOTICE OF MOTION.

NOTICE IS HEREBY GIVEN YOU that at a Supreme Court of the United States to be holden at the Capitol in the City of Washington, in the District of Columbia on Monday, the 18th day of January, A. D. 1909, at the opening of the court on that day, the plaintiff in error and the appellant, respectively, in the above entitled causes will present and submit to the said the Honorable the Supreme Court of the United States, his motions to advance said cases and each of them, to an early hearing to be heard and determined together. A copy of said motions is herewith served upon you, and the motions will

be made upon the facts and matters therein stated and for the reasons therein given, and set forth.

Respectfully,

GEORGE D. COLLINS,
Counsel for Appellant and for Plaintiff in Error.

To the said defendants in error and to the said appellees and their counsel, Hon. U. S. Webb, the attorney general of the State of California, and W. H. Langdon, Esq., the district attorney of the City and County of San Francisco, and William Hoff Cook, Esq., assistant district attorney of the City and County of San Francisco.
Dated December 16th, A. D. 1908.

IN THE SUPREME COURT OF THE UNITED STATES.

George D. Collins, *Appellant,* *vs.* The Sheriff of the City and County of San Francisco, the People of the State of California and the State of California, *Appellees.*	No. 320 October Term A. D. 1908.
George D. Collins, *Plaintiff in Error,* *vs.* Thos. F. O'Neil, the sheriff of the City and County of San Francisco, the People of the State of California, and the State of California, *Defendants in Error.*	No. 241 October Term A. D. 1908.

AFFIDAVIT OF SERVICE OF MOTION AND OF SERVICE OF NOTICE OF MOTION TO ADVANCE CASES, ETC.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

E. H. ORR, being duly sworn, deposes and says that she is now and for many years last past has been a citizen of the United States and a resident of the State of California. That she is a stenographer and as such has been in the employ of Mr. George D. Collins, attorney and counsellor-at-law, that on the 16th day of December, A. D. 1908, in the City and County of San Francisco, State of California, and at the request of Mr. Collins, she personally deposited in the United States mail, duly

postpaid, to wit: in the United States Post Office in said City and County of San Francisco, and mailed in sealed envelopes addressed severally to the following attorneys and counsel for the said appellees and defendants in error, to wit: Hon. U. S. Webb, attorney general of the State of California, and also in a sealed envelope addressed to W. H. Langdon, Esq., district attorney of the City and County of San Francisco, and also in a sealed envelope addressed to William Hoff Cook, Esq., assistant district attorney of the City and County of San Francisco, all of whom then and there were and are residents thereof, directed to each of them respectively, at their respective and proper office address in said City and County of San Francisco, with postage duly prepaid on each of said sealed envelopes and contents, a true copy of the motion dated January 18, A. D. 1909, and of the notice of said motion, which notice is dated December 16, A. D. 1908, to advance the above entitled causes to an early hearing and determination, to be heard and determined together by the Supreme Court of the United States. That each of said sealed envelopes, at the said time and place of the said mailing of the same contained a true copy of said motion and also of said notice of said motion. That each of said sealed envelopes, mailed as aforesaid and the said contents of each were as aforesaid, deposited by affiant in said mail to the said proper address of each of said attorneys and said counsel for said appellees and said defendants in error, duly postpaid, at such time as to reach each of said counsel by due course of mail, at least thirty days before the 18th day of

January, A. D. 1909, the date and time fixed in said notice of said motion. That a copy of the printed brief and argument of the appellant and plaintiff in error, on file in said causes above entitled has been served upon and delivered to said William Hoff Cook, Esq., of counsel for said appellees and defendants in error.

Subscribed and sworn to before me, this 16th day of December, A. D. 1908.

E. H. Orr.

Julius Calmann,
Notary Public in and for the City and County of San Francisco, State of California.

[NOTARIAL SEAL.]

Supreme Court, U. S.
FILED
DEC 7 1908
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

GEORGE D. COLLINS, *Appellant,*

vs.

THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA, *Appellees.*

No. 320.
OCTOBER TERM, A. D. 1908.

No. 667.
OCTOBER TERM, A. D. 1907.

ON APPEAL FROM JUDGMENT OF UNITED STATES CIRCUIT COURT, DENYING HABEAS CORPUS.

Brief and Argument of the Appellant.

GEORGE D. COLLINS,
COUNSEL FOR THE APPELLANT.

BARNARD & MILLER PRINT, CHICAGO.

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IN THE

Supreme Court of the United States.

GEORGE D. COLLINS, *Appellant.* *vs.* THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, and THE STATE OF CALIFORNIA, *Appellees.*	No. 320. OCTOBER TERM, A. D. 1908. — No. 667. OCTOBER TERM, A. D. 1907.

ON APPEAL FROM JUDGMENT OF UNITED STATES CIRCUIT COURT, DENYING HABEAS CORPUS.

GEORGE D. COLLINS, *Plaintiff in Error,* *vs.* THOMAS F. O'NEIL, the Sheriff of the City and County of San Francisco, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA, *Defendants in Error.*	No. 241. OCTOBER TERM, A. D. 1908. — No. 561. OCTOBER TERM, A. D. 1907.

ON WRIT OF ERROR TO SUPREME COURT OF CALIFORNIA.

Brief and Argument of the Appellant and Plaintiff in Error.

STATEMENT OF CASE.

This is a case of international extradition, pursuant to the *treaty* between Great Britain and the United States. 1. The question is, can the prosecuting state, having received the custody and possession of the accused, in trust for the special purpose authorized and prescribed by the *treaty*, use and divert that custody and possession to an entirely different purpose, contrary to the trust, and instead of complying with the requirements of the treaty, substitute another and different prosecution on another and different charge? And if the prosecuting state can do this, then what becomes of the high obligations imposed by the supreme and exclusive authority of the extradition jurisdiction over the person of the accused, in order to insure the due execution of the *treaty*? And what becomes of the rights conferred upon the accused, by the treaty, and by Section 5275 of the Revised Statutes of the United States, particularly the rights supreme and paramount, to a trial to a final conclusion and within a reasonable time of the charge on which his extradition was granted, and this to the exclusion of every other and different charge? And what becomes of his right to return to the country of asylum, when acquitted on the charge upon which he was extradited, and of his right to an opportunity in due course, to obtain such acquittal?

And can the prosecuting state intercept the due

course of the extradition process, and by means of another and different prosecution on another and different charge, frustrate the extradition and nullify the requirements of both the treaty and the statute above cited?

2. If the accused is not brought to a trial to a final conclusion on the extradition charge, *within a reasonable time*, does this operate to terminate the extradition jurisdiction over his person, and entitle him to release on *habeas corpus*, and is an inexcusable and an indefensible failure, against his constant objection and protest, to give him such trial, for a period of now *three years* and more, sufficient in law to render his imprisonment unlawful, especially when by the law of the prosecuting state, an inexcusable delay for *sixty days*, renders void the indictment, and entitles the accused to his discharge on the writ of *habeas corpus*?

3. Is the sheriff authorized to hold in custody the accused, where the warrant of extradition does not run to him, nor in any manner permit him to exercise such authority, except by appointment of the United States, and he has not been so appointed?

These various questions in turn give rise to others of much importance; all the questions involved in the case are presented and discussed in this brief, and many authorities cited and quoted, all of them in point, and fully sustaining the propositions we urge and maintain in support of our right to liberty.

The appellant and plaintiff in error was extra-

dited from Canada, in the month of *October,* 1905, on an indictment charging perjury as having been committed by him on the 30th day of June, 1905, which indictment was found and filed in the Superior Court of San Francisco on the 13th day of July, 1905. He was brought to trial on this charge, in November, 1905, with the result that on December 22, 1905, the jury disagreed and were discharged. The case was then set down for trial on an early date in the following month; but before the date so set, arrived, and on *December* 29, 1905, another indictment, of course not within the extradition, was filed in the same court, charging him with perjury as having been committed on December 12, 1905, in testifying as a witness on the mistrial of the extradition case. He was then arrested *December* 29, 1905, upon this second indictment, and over his objection and protest expressly predicated upon the *treaty* and also on Section 5275 of the Revised Statutes of the United States, and upon the ground of a consequent want of jurisdiction of his person, *he insisting that the pre-existing extradition jurisdiction over him, was supreme and exclusive,* and entitled him to first be given a trial to a final conclusion of the charge on which he was extradited, and if acquitted, to return without detention to the country of asylum, he was forced by the state court to enter his plea of "not guilty", and to submit to trial on the second charge of perjury, *to the exclusion of the extradition case,* and after a very unfair trial, he was convicted on February 27, A. D. 1906, and on March 10, A. D. 1906, he was sentenced by the state court on the second indictment, to imprisonment in the penitentiary for fourteen years. At every step

in this extraordinary and manifestly unlawful proceeding, he firmly protested, and in that behalf, each time set up with much emphasis, and claimed the rights given him by the *treaty* and by Section 5275 of the Revised Statutes of the United States and by the well settled principle of international law prohibiting a trial on any charge *different* from the one on which the extradition was granted. The state court in every instance overruled this objection and protest. It is now more than *three years* since he was extradited, and he is still imprisoned without trial, under the warrant of extradition; and despite his demand made at the inception of the second prosecution in December, 1905, and repeatedly afterwards, that the extradition case be *first given a trial to a final conclusion,* the charge on which he was extradited, is still awaiting final trial. In fact, the second perjury charge has been virtually substituted by the state authorities for the extradition charge and the further prosecution of the latter has been discontinued and dropped, and this, as the record discloses, against the objection and protest of the accused, urged and explicitly based both upon the *treaty* and Section 5275 of the Revised Statutes of the United States.

The judgment and sentence on the second perjury charge have been affirmed by the state district court of appeal and are final, but, of course, manifestly null and void, as will be satisfactorily established in this brief, in the argument presented and by the numerous authorities we will be able to cite in support of our position. The appellant and plaintiff in error is now imprisoned by the sheriff of San

Francisco, representing the State of California, in the county jail, by virtue of no other authority than this void judgment, and as will also be established in this brief, the now legally defunct warrant of extradition, which as a matter of law, has become inoperative and void of authority, because the extradition case has not been brought to trial to a final conclusion *within a reasonable time or at all.* Nor has the sheriff any right, in any event, to hold him on the warrant of extradition, as it does not run to the sheriff, nor does it permit him to take the custody, except by special appointment of the United States, and he has never been so appointed. All the questions presented on both the appeal and writ of error, are distinctively and essentially *Federal* in their nature and origin, appertaining to a subject over which exclusive power and authority are vested by the constitution in the Government of the United States in right of its national sovereignty. On its merits, we rest our case upon the following fundamental, supreme and paramount rights derived from the *treaty,* from Section 5275 of the Revised Statutes of the United States and from international law, viz.:

1. The right to a trial to a final conclusion of the charge on which the extradition was granted, and to the exclusion of any and every different charge or prosecution, the extradition jurisdiction over the person of the accused being supreme and exclusive by virtue of the *treaty,* the supreme law of the land and by virtue of Section 5275 of the Revised Statutes of the United States.

2. The right of the accused to return to the country of asylum, on his acquittal of the extradition charge and his right to an opportunity to obtain such acquittal.

3. As essential to the rights mentioned, his right to a trial to a final conclusion, *within a reasonable time*, of the charge upon which he was extradited and herein to the exclusion of any trial or prosecution on any different charge.

4. The right of the accused, granted him by the *treaty*, to the judgment and decision of the country of asylum upon the evidence adduced, before he can be placed on trial or prosecuted on a charge of committing an offense of an extraditable character, subsequently to the extradition surrender and prior to the expiration of his right to return to the country of asylum. This prerogative of passing upon the evidence belongs exclusively to the sovereignty granting the asylum, and its purpose is to enable that country, in right of its sovereignty, to protect the asylum conferred and reserved to the accused against every trial or prosecution on any and every charge other than and different from the one upon which his extradition was granted. A trial or prosecution on a charge of committing an extraditable offense, subsequently to the extradition surrender, is only permissible when authorized by a *new* extradition, unless the accused fails to return to the country of asylum within the prescribed time; in which event he may be prosecuted on any charge whether of a prior or subsequent offense and whether extraditable or not. It is not within the power of the prosecuting state to cut off the right of asylum

nor destroy or impair the right of the accused to return free from detention, interference or molestation, to the country of asylum, either at once upon his final release on the extradition charge or within a reasonable time afterwards. With this right the prosecuting state cannot interfere by means of nor under the pretext or subterfuge of a subsequent prosecution on the charge of a subsequent offense. The value of the right of asylum consists in its actual enjoyment. To deprive the accused of the benefit of it when entitled, or to postpone his right to acquire its benefit, is to deny him the asylum conferred and reserved. So, too, postponing unnecessarily or unlawfully the final disposition of the extradition case, is depriving him *pro tanto* of the benefit of the right of asylum, and of the benefit of the right to return to the country of asylum; unnecessarily prolonging his imprisonment on the extradition charge is clearly in violation of his rights, and in violation of the *treaty* and of the statute. Unlawfully postponing the enjoyment of a legal right is tantamount to a corresponding denial and deprivation of the right. Hence the law of the *treaty* and of Section 5275 of the Revised Statutes of the United States requires that the extradition case be prosecuted with due diligence to a final conclusion, and to the exclusion of every charge other than the one designated in the warrant of extradition. The right to return to the country of asylum on acquittal in the extradition case, cannot be forfeited, if at all, until after it has vested; and besides this, there is no law declaring a forfeiture; and we have no bills of attainder nor *ex post facto*

laws. A right conferred by a supreme law, cannot be forfeited for violating a subordinate law. As said by Judge COOLEY, the accused is within the state by compulsion upon a single accusation; it is his right to have this disposed of and then to depart in peace. It would be monstrous to give the prosecuting state the power to say by means of a subsequent prosecution or by means of any other scheme it may devise, that the right of asylum and the right to return to the country of asylum, should be denied the accused. The *treaty* very properly makes the country of asylum, in right of its sovereignty, the only competent judge to decide from the evidence adduced, whether the accused shall be deprived of the right of asylum, upon a subsequent charge of committing an extraditable offense subsequently to his surrender in extradition, but prior to the expiration of his right to return.

It would be perfectly preposterous to confer this power on the state which had not granted the asylum, and which in fact is always antagonistic to the "right of asylum." It is an unheard of thing, that the sovereign right of asylum exists merely at the will, toleration or mercy of an opposing state, prosecuting the accused in defiance of its protection, and perhaps for the very purpose of preventing him from returning to the country from whose asylum and protection he had been forcibly taken on extradition, but on condition imposed that the receiving state should allow him to return free from all detention or molestation, on his final release upon the charge on which he had been extradited; and to this end, that he should be given a trial to a final con-

clusion and with due diligence, upon the extradition charge, to the exclusion of every different charge.

So it will be seen that all the principles and doctrines of the law upon the subject of trial and prosecution of the accused by the receiving state have but one ultimate purpose, and that purpose the protection and the conservation of the sovereign right of asylum as guaranteed by the *treaty,* in abridging it only to the extent of the special extradition, and by fiction of law, deeming the accused as against every charge and prosecution other than as authorized by the particular extradition, to still remain in the territory of the country of asylum and within the protection of its laws, thus making it necessary that there be a *new* extradition before he can be placed on trial or prosecuted on a charge of committing an extraditable offense, subsequently to the extradition surrender and prior to the expiration of his right to return to the asylum reserved to him by the *treaty.*

If, of course, he fails to return within the prescribed limit of time, he is considered to voluntarily abandon the asylum he had acquired, and may then be prosecuted on any charge.

It is the well settled doctrine of the law that an extradition treaty is in its essential nature, simply a limitation for a special purpose, of the right of asylum; and that as against every trial and every prosecution not authorized by the particular extradition, the asylum obtained by the accused, still persists and still continues, thus making the extradition jurisdiction in the case where it exists, supreme and exclusive over the person of the accused, and pro-

hibiting the exercise of any other jurisdiction over him, upon any other and different charge than the one upon which his extradition was granted.

In the concrete this means that no "extradited person" can without his consent be placed on trial nor prosecuted on any different criminal charge, except by the special authority of an extradition pursuant to the terms and conditions of the *treaty*, where he has not waived his right to return to the country of asylum; he certainly cannot forfeit it, for the law places him in the territory of the sovereignty granting the asylum, as against every trial and prosecution on any other and different charge; and, besides this, there is no law declaring a forfeiture. The extradition jurisdiction exists solely for the purpose of carrying out and executing the requirements of the *treaty*, the supreme law of the land, and the provisions of Section 5275 of the Revised Statutes of the United States.

In its very nature and purpose it excludes every jurisdiction over the person of the accused essential to his trial and prosecution on another and different charge, while the extradition case is pending and awaiting trial to a final conclusion. This very important and decisive point as to the supreme and exclusive nature of the extradition jurisdiction was disposed of by both the State Supreme Court and the Federal Circuit Court, *by simply ignoring it*, and deciding the case in entire disregard of it, and without the slighest reference to it. Nothing the lower courts say in the opinion filed responds as much as remotely, nor has the slightest relevancy to the very controlling point suggested, although, as shown by

the record in each case, it was both raised and urged with much emphasis. It is a point absolutely unanswerable, and meets most conclusively every reason and argument advanced in the opinion of the State Supreme Court and in the concurring opinion of the Federal Circuit Court. It was absolutely impossible for the State Superior Court to acquire jurisdiction over the person of the accused, on the second perjury charge, while the preceding extradition jurisdiction over his person persisted and continued in the full supremacy of its exclusive control and authority conferred by the *treaty*, the supreme law of the land, and existing for the sole and only purpose of executing the treaty.

I.

HOW THE QUESTIONS INVOLVED ARE RAISED.

The case comes before the Supreme Court of the United States, on an *appeal* duly allowed, from the judgment of the United States Circuit Court, Northern District of California, refusing to grant the appellant the writ of *habeas corpus*, and on a *writ of error* to the Supreme Court of California, directed against the judgment of that court, remanding the plaintiff in error to the imprisonment complained of, after granting and issuing the writ of *habeas corpus*, taking some five months to decide the case.

On the *appeal*, the case is presented on the petition or complaint for *habeas corpus*, the rule *nisi* issued by the Circuit Court, the return made in answer to the rule, and a bill of exceptions presenting the facts (*there was no evidence offered to support*

the answer and return); and certain rulings to which exception was reserved; also the decision and judgment of the *court,* refusing to grant *habeas corpus* and the assignment of errors printed in the record, which is hereby specially referred to and made part of this brief as fully as though set forth herein; also the specification of errors, and the prayer for reversal of the judgment. On the *writ of error* the case is presented on the petition for *habeas corpus,* the writ of *habeas corpus,* the return to the latter writ, the exceptions to the sufficiency of the return, raising simply questions of law, the decision overruling the exceptions, the answer or traverse to the return, the judgment as well as the opinion with its special finding of facts, remanding the plaintiff in error to the imprisonment complained of, and the assignment of errors, printed in the record, which is hereby specially referred to and made part of this brief as fully as though set forth herein; also the specifications of errors, and the prayer for the reversal of the judgment. A thorough review of the decision and opinion of the State Supreme Court and of the Federal Circuit Court will be found at page 128, and following of this brief. All the federal questions in this brief presented were raised and decided, and the record so shows.

II.

SPECIFICATION OF ERRORS.

1. On the appeal from the judgment of the United States Circuit Court we specify the following errors:

The court erred in refusing to grant the appellant the writ of *habeas corpus.*

The court erred in refusing to discharge the appellant on *habeas corpus* from the imprisonment complained of.

The court erred in ruling that the appellant was not entitled to the remedy of *habeas corpus* issuing out of and under the seal of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

The court erred in deciding that the appellant is not unlawfully imprisoned in violation of the treaty of extradition between the United States and Great Britain, to wit: the treaty of 1842 and the subsequent convention of 1889.

The court erred in deciding that the appellant is not unlawfully imprisoned in violation of Section 5275 of the Revised Statutes of the United States.

The court erred in deciding that the appellant is not unlawfully imprisoned in violation of international law.

The court erred in deciding that the appellant is not entitled to his release on *habeas corpus* issuing out of and under the seal of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California, from the imprisonment under the trial, conviction, judgment and sentence of the Superior Court of San Francisco, on the second perjury charge.

The court erred in deciding that the appellant is not entitled to his release on *habeas corpus* issuing out of and under the seal of the United States Cir-

cuit Court, Ninth Judicial Circuit, Northern District of California, from the imprisonment under the warrant of extradition and the Superior Court bench warrant.

The court erred in deciding that the appellant is not unlawfully imprisoned in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and in deciding in that respect that he is not by the State of California deprived of his liberty without due process of law, and in further deciding that he is not by the State of California in his imprisonment and by reason of his imprisonment, denied the equal protection of the law.

The court erred in deciding that the arrest, trial, prosecution, conviction, judgment and sentence of the appellant in the Superior Court of San Francisco, on the second perjury charge, are not unlawful and void, and in violation of the said treaty of extradition of 1842, between Great Britain and the United States and of the convention of 1889.

The court erred in deciding that the imprisonment of appellant, under the warrant of extradition, is not unlawful.

The court erred in deciding that his imprisonment by the sheriff of San Francisco, under the warrant of extradition, is not unlawful.

The court erred in deciding that the arrest, trial, conviction, sentence and judgment of appellant in the Superior Court of San Francisco, on the second perjury charge, are not unlawful and void and in violation of Section 5275 of the Revised Statutes of

the United States, and also erred in deciding they are not in violation of international law.

The court erred in deciding that the said arrest, trial, conviction, sentence and judgment of appellant in the Superior Court of San Francisco are not unlawful and void, and in violation of the rights conferred on him by the treaty of extradition between Great Britain and the United States, by Section 5275 of the Revised Statutes of the United States and by international law.

The court erred in deciding that the warrant of extradition had not become inoperative and void of authority by reason of the failure to bring the extradition case to trial, to a final conclusion, within a reasonable time.

The court erred in deciding that the appellant is not entitled to his liberty on *habeas corpus*, for the purpose of returning to the country of asylum.

The court erred in deciding that the extradition case had been brought to trial, to a final conclusion, within a reasonable time.

That the court erred in deciding that the appellant, or any other person extradited pursuant to the treaty between Great Britain and the United States, upon a specific and described charge of perjury, can be legally arrested, placed on trial, convicted and sentenced upon another and different charge of perjury, and also in deciding that this can be legally done while the extradition case is pending and awaiting trial to a final conclusion, and while the accused is held under the warrant of extradition and while he is held under the supreme

and exclusive authority of the extradition jurisdiction, pursuant to the treaty.

The court erred in refusing to permit the appellant to prove "that the United States never appointed nor designated any person or persons and never appointed nor designated the sheriff of the city and county of San Francisco to receive the custody of the petitioner from Thomas Gibson, the person designated in the warrant of extradition, and never directed said Gibson to deliver or surrender said petitioner to the sheriff of the city and county of San Francisco." (Rec., 20.)

The court erred in ruling out the proof offered by appellant to show "that without his consent and against his will and without the consent of the United States or of Great Britain he was by the State of California removed from the custody of the agent of the United States designated in the warrant of extradition, to wit, Thomas Gibson, and placed in the custody of the sheriff of the city and county of San Francisco, where he has been held and imprisoned ever since." (Rec., 20.)

The court erred in denying and dismissing the petition for *habeas corpus* and in refusing to grant the writ of *habeas corpus*. It should be explained that the case referred to in the return to the rule *nisi* (Rec., 8), is the case cited in the opinion (Rec., 19) and reported in 154 Fed. Rep., 980. It was *after* following out the requirements and conditions stated in the opinion reported in 154 Fed. Rep., 980, in respect to exhausting all remedies provided by the state, that appellant then having first done this, filed and presented the petition and complaint for

habeas corpus involved in this appeal. There is no point possible as to the previous decision being *res adjudicata;* of course, it is elementary that it is not. There was no decision on the *merits.* Nor is it pleaded as being *res adjudicata.* Besides, the facts are not the same in all respects.

2. On the writ of error to the Supreme Court of the State of California we specify the following errors:

The court erred in overruling the exceptions filed and presented by plaintiff in error, to the sufficiency in law, of the return made by the sheriff of San Francisco and by the State of California to the writ of *habeas corpus* theretofore granted and issued by said court.

The court erred in deciding that plaintiff in error is not unlawfully imprisoned in violation of the treaty of extradition of 1842, nor of the subsequent convention of 1889, between Great Britain and the United States.

The court erred in deciding that plaintiff in error is not unlawfully imprisoned in violation of Section 5275 of the Revised Statutes of the United States, and erred in deciding that he is not imprisoned in violation of international law.

The court erred in d ing that plaintiff in error is not unlawfully imprisoned in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and not deprived by the State of California of his liberty without due process of law, and not denied by the State of California the equal protection of the law.

The court erred in deciding that the arrest, trial, conviction, judgment and sentence of plaintiff in error on the second perjury charge, in the Superior Court of San Francisco, are not unlawful and void and in violation of the said treaty of extradition between the United States and Great Britain.

That the court erred in deciding that the arrest, trial, conviction, judgment and sentence of plaintiff in error, on the second perjury charge, in the Superior Court of San Francisco, are not unlawful and void and in violation of Section 5275 of the Revised Statutes of the United States, and in deciding they are not in violation of international law.

The court erred in deciding that the arrest, trial, conviction, judgment and sentence, on the second perjury charge, in the Superior Court of San Francisco, are not unlawful and void and in violation of the rights conferred on plaintiff in error by the said treaty of extradition between Great Britain and the United States, by Section 5275 of the Revised Statutes of the United States, by international law and by the warrant of extradition.

That the court erred in deciding that the said arrest, trial, conviction, judgment and sentence of the plaintiff in error, in the Superior Court of San Francisco, are not unlawful and void for want of jurisdiction over his person.

That the court erred in deciding that the said arrest, trial, conviction, judgment and sentence of the plaintiff in error, in the Superior Court of San Francisco, are not unlawful and void and in violation of the extradition jurisdiction over his person.

That the court erred in deciding that the imprisonment of plaintiff in error, under the warrant of extradition and under the Superior Court bench warrant is not unlawful.

That the court erred in deciding that the imprisonment of the plaintiff in error by the sheriff of San Francisco, under the warrant of extradition, is not unlawful.

The court erred in deciding that the warrant of extradition did not cease to be operative and effective, and become void of authority, by reason of the failure to bring the extradition case to trial, to a final conclusion, within a reasonable time.

The court erred in deciding that the extradition case was brought to trial, to a final conclusion, within a reasonable time.

The court erred in deciding that the plaintiff in error is not entitled to his liberty on *habeas corpus* to return to the country of asylum.

The court erred in deciding that the plaintiff in error is not entitled to his discharge from the imprisonment complained of, and upon the writ of *habeas corpus.*

The court erred in deciding that plaintiff in error did not prove that the extradition case was not brought to trial ~~on~~ for a final conclusion within a reasonable time.

The court erred in remanding plaintiff in error to the custody of and to the imprisonment by the sheriff of San Francisco, to be by him held on process in the case where the conviction, sentence and judgment had been rendered against plaintiff in error by the Superior Court of San Francisco.

The court erred in remanding plaintiff in error to the custody of and to the imprisonment by the sheriff of San Francisco upon the warrant of extradition, and upon the bench warrant of the said Superior Court, and in refusing to release and discharge plaintiff in error and restore him to his liberty on the writ of *habeas corpus*.

That the court erred in deciding that plaintiff in error is properly and lawfully in custody of the sheriff of San Francisco, upon the judgment of conviction and sentence of the Superior Court of San Francisco, and erred in deciding that the same are not null and void for want of jurisdiction over his person, and in deciding that the same are not null and void because in contravention of the extradition jurisdiction; also in deciding that the same are not null and void because in contravention of the treaty of extradition between Great Britain and the United States; also in deciding that the same are not null and void because in violation of Section 5275 of the Revised Statutes of the United States; also in deciding that the same are not null and void because in violation of international law, and also in deciding that the same are not null and void because in violation of the rights conferred on him by said treaty and by said Section 5275 of the Revised Statutes and by international law.

That said Supreme Court of California erred in deciding that the plaintiff in error is properly in the custody of the sheriff of San Francisco, on the bench warrant of the Superior Court and the extradition proceedings thereon.

That the court erred in deciding that the plain-

tiff in error is not entitled to his release on *habeas corpus* from the imprisonment under the conviction, sentence and judgment of the Superior Court of San Francisco, on the second perjury charge.

That the court erred in deciding that the plaintiff in error is not entitled to his release on *habeas corpus*, from the imprisonment under the bench warrant of said Superior Court, in the extradition case, and also erred in deciding that he is not entitled to his release on *habeas corpus* from the imprisonment under the warrant of extradition.

That the court erred in deciding that the plaintiff in error or any other person extradited pursuant to the treaty between Great Britain and the United States upon a specific and described charge of perjury, can be legally arrested, placed upon trial, convicted and sentenced upon another and different charge of perjury, and also in deciding that this can be legally done while the extradition case is pending and awaiting trial to a final conclusion, and while the accused is held under the warrant of extradition, and while he is held under the supreme and exclusive authority of the extradition jurisdiction, pursuant to the *treaty*.

III.

SUMMARY OF THE LAW DETERMINATIVE OF THE QUESTIONS RAISED.

The law by which the questions presented are to be determined, may by way of preface be here summarized, simply for the purpose of indicating with some greater clearness of description, the character

and the extent of the points raised. The complete, and we trust, the satisfactory discussion of the law, together with the citing of the authorities amply sustaining these points, and amply sustaining our claim that we are illegally imprisoned in violation of the *treaty* and of Section 5275 of the Revised Statutes of the United States, will in the orderly course, with the exception of one or two of the points, sufficiently presented in this summary, be found in that part of this brief, entitled "Further Argument on Main Propositions. Fundamental Principles of the Law of Extradition," and the succeeding chapters of the brief. We, at this time, for the purpose stated, offer the following summary, feeling sure that it will serve to induce a clearer and more comprehensive view of the case, and of the important questions raised, as well as of the law which must control their decision.

1. The treaty of extradition of 1842, between Great Britain and the United States, known as the "Ashburton Treaty." Also the supplementary convention of 1889. The sixth article of the Constitution of the United States, declaring the treaty to be "the supreme law of the land." It will be fully established in this brief that Article 3 of the convention of 1889, has no possible application in law, in reason nor in logic, to any of the questions we present, and gives rise to no pertinent inference or deduction in relation to any of the questions raised. It should not be permitted to mislead into erroneous and superficial impressions.

2. Section 5275 of the Revised Statutes of the United States, brought forward from the Act of

Congress of March 3rd, 1869, entitled "An Act Further to Provide for Giving Effect to Treaty Stipulations Between This and Foreign Governments for the Extradition of Criminals." (15 Stat. at Large, U. S., 337.) The sixth article of the Constitution of the United States declaring such statute to be "the supreme law of the land."

3. The well established principle of international law, incorporated both in the treaty and in Section 5275 of the Revised Statutes of the United States, that a person extradited pursuant to a *treaty*, has the legal and supreme right to a trial to a final conclusion of the charge on which his extradition was granted; and this, necessarily in priority over, and to the exclusion of any and every different charge, irrespective of whether such other charge be that of an offense committed subsequently to the extradition surrender or not.

No jurisdiction can be acquired over the person of the accused on a subsequent prosecution for an alleged subsequent offense, nor to put him on trial, nor to render judgment thereon, while he is held under the supreme authority of the warrant of extradition, and of the extradition jurisdiction, for the purpose of enforcing and carrying into execution the provisions of the *treaty*, the supreme law of the land. There can be but one supreme law; in its presence all other laws must yield their power and authority. It is a maxim of jurisprudence, that *In praesentia majoris cessat potentia minoris.* There can be no jurisdiction over the person, without a law conferring it. If there are two "laws" purporting to confer jurisdiction, and over the same per-

son, one of these laws supreme, the other not, *there is but one jurisdiction, and that the jurisdiction of the supreme law.* The scope of its authority is an entirety, and indivisible, for supremacy is necessarily entire and omnipotent within the sphere of its legitimate control. To permit an inferior law to exert authority in dominion over the subject assigned to the control of the supreme law, is to subvert the supreme law, and invade the domain of its exclusive jurisdiction. We say its "exclusive jurisdiction," for if it is concurrent or subordinate, then the law is not and cannot be supreme. Even a concurrent jurisdiction becomes exclusive when it is the first to become vested either over the person or the subject matter. The jurisdiction over a person extradited pursuant to *treaty*, is in its every aspect and operation, necessarily *sui generis*, and is not the ordinary or local jurisdiction which the prosecuting state possesses in the usual administration of its local criminal law. The extradition, it must be understood, is not merely the matter of a transfer of the accused from one state to another, then ceasing its power and protection, and releasing its requirements, the instant he comes within the territory of the latter, thus surrendering and leaving him to the same absolute control of the prosecuting state for the purpose of any criminal prosecution it may desire, as is vested in it over every person within its territory, not officially privileged and who has not been the subject of a treaty extradition. On the contrary, the jurisdiction of the extradition with all its requirements, restrictions and restraints, extends over the accused, until the final termination of the extradition

case and for a reasonable time afterwards, and affording him a reasonable opportunity after his final release from custody or imprisonment on the extradition charge, to return to the country of asylum, free from all interference, interruption, detention and molestation, no matter from what source it may come. In the language of Judge COOLEY, adopted by the Supreme Court of the United States in the Cosgrove case, "He is within the state by compulsion of law" (and that the law of the treaty), "upon a single accusation. He has a right to have that disposed of, and then to depart in peace." The extradition takes his custody while he is in the power of a sovereignty, to whose territory the criminal laws of the prosecuting state cannot extend; and for a specially limited and precisely defined purpose, prescribed by the *treaty,* continues and perpetuates its supreme and necessarily exclusive authority and control over his person, in the territory of the prosecuting state, and throughout the prosecution of the case, until its final termination, and thereafter until the accused has been given a reasonable time and opportunity to return to the country of asylum. To prosecute him and place him on trial on another charge while the extradition case is pending and awaiting trial to a final conclusion, would clearly be repugnant to and an invasion of the exclusive jurisdiction over his person, held by virtue of the *supreme* authority of the warrant of extradition, in execution of the treaty. And this is manifestly and emphatically true, in a case where the collateral trial and prosecution are upon a subsequent charge of committing an extraditable offense subsequently to the extradition sur-

render. It is as fully and completely an invasion and violation of the pre-existing extradition jurisdiction as if it were a prosecution on a subsequent charge of committing an extraditable offense prior to the surrender. One is manifestly just as much an infringement of the jurisdiction created by the *treaty* as is the other. There is a difference it is true, between prior and subsequent offenses, but obviously not in this particular,—not in respect to a trial and prosecution while the extradition case is pending and while the extradition jurisdiction persists and continues in the supremacy of its exclusive control and authority over the person of the accused for the purpose of carrying into execution the necessarily *paramount* requirements of the treaty. The difference that does exist between prior and subsequent offenses is very extensively discussed in other parts of this brief, especially in relation to the meaning of Article 3 in the convention of 1889;—it being permissible to prosecute subsequent offenses extraditable in character, upon a new extradition, but never permissible to prosecute prior offenses unless the accused waives his rights.

4. The law prohibits, the *treaty* prohibits the arrest, the trial, the prosecution and conviction of an extradited person upon any charge, whatsoever, *different* from that upon which his extradition was granted. There is no exception in favor of subsequent offenses. The purpose of this prohibition is two-fold: first, to enforce the supreme right vested in the accused by the *treaty* and by Section 5275 of the Revised Statutes of the United States, to a trial to a final conclusion, and within a reasonable

time after the surrender, of the specific charge on which his extradition had been granted; and secondly, to conserve and enforce, and make available, and protect from all interference, impairment and obstruction, as well as postponement, by the means of a subsequent prosecution on a different charge, not only the extradition jurisdiction, but the right of the accused to return to the country of asylum. For these several reasons, the prohibition referred to is manifestly very strongly applicable to an arrest, trial, prosecution and conviction on a subsequent charge of an offense alleged to be subsequently committed.

5. An extraditable offense committed after extradition, and before the termination of the extradition case, can only be prosecuted upon and by virtue of the authority of a *new* extradition, unless the accused waives his right to return to the country of asylum within the time limited. It is the well settled doctrine of the law that against a person who has sought and obtained an asylum in a foreign country, there can be no criminal prosecution in the state from which he departed, except it be by and pursuant to the special authority of the treaty of extradition, while he remains within the protection of the laws of the country of asylum. Further, that when he is extradited pursuant to the *treaty*, it is only for the special and limited purpose of giving him a trial to a final conclusion, upon the specific charge on which his extradition was granted; and that as against all other prosecutions and against any trial or conviction on a charge of committing an offense subsequently to the extradition surren-

der and prior to the expiration of his right to return to the country of asylum, *the law deems his person to be still within the territory of the country of asylum.* If he returns thereto, within the prescribed period, he is granted absolute immunity as to all offenses committed prior to the extradition surrender, as well as to all non-extraditable offenses committed subsequently; but as to any extraditable offense committed after the extradition surrender, he can be prosecuted, but only upon the authority of a *new* extradition.

If he does not return to the country of asylum within the prescribed time, he waives the protection of the right of asylum, and can legally be prosecuted without further extradition, upon any charge, prior or subsequent, extraditable or not. Of course it is not permissible for the *prosecuting state* to deprive the accused of his supreme right to return to the country of asylum, nor to deprive the sovereignty of the country of asylum, of the power granted in the *treaty* to determine in the first instance and as to *every* extraditable charge, whether the evidence adduced is sufficient to justify a withdrawal of the asylum conferred, or to justify a modification or abridgment of the right of asylum to the extent of the charge made as to the subsequent but extraditable offense; we say it is not competent for the prosecuting state to accomplish any such deprivation of right or destruction of sovereign power, by seizing and arresting the accused while he is under the protection of the extradition jurisdiction, and in violation of every obligation imposed by the *treaty* and by Section 5275 of the Revised

Statutes of the United States, forthwith discontinue the prosecution of the extradition case, and in lieu thereof, place the accused on trial, prosecute and convict him, without authority of a *new* extradition, on the altogether different charge of committing an extraditable offense subsequently to the extradition surrender, thereby cutting off the right of asylum and the right to return to the country of asylum, doing this without the consent of the sovereignty which had granted it, and modified or abridged it only to the specially limited extent of the preceding extradition, *reserving* it for the benefit of the accused, against his arrest, or trial, or prosecution on *all* other charges, at least until again modified or relinquished by another extradition pursuant to the *treaty*, unless he has voluntarily waived his rights and abandoned the asylum reserved for him. To confer on the prosecuting state the power to cut off and destroy the right of asylum, perhaps under pretext and subterfuge of a prosecution for, or merely a charge and nothing more than a charge of an alleged subsequent offense, perhaps a charge or offense simulated and fabricated for the very purpose, would manifestly be monstrous in the extreme. Whether or not the subsequent extraditable offense has been committed, or whether there is *prima facie* evidence of its commission, is a question which rightly and under the treaty itself, must be passed upon and determined in the first instance exclusively by the country of asylum; for otherwise, it would be within the power more or less arbitrary of the state antagonistic to the asylum conferred, to defeat the "sovereign right of asylum," and the

right of the accused to return to the country of asylum, by merely resorting to the pretext or subterfuge of a charge or prosecution on an alleged subsequent offense; and if the accused was acquitted on the latter, the violation, interruption and impairment of his right to return and of the rights of asylum, by his detention on the subsequent charge, would be without remedy; and if he was wrongfully convicted, *and as in this very case, convicted contrary to both the law and the evidence,* and denied all relief in the state courts, he would have no redress for the loss and destruction of the supreme rights given him by the *treaty* and by Section 5275 of the Revised Statutes of the United States, nor would the foreign nation whose sovereignty alone conferred and reserved "the right of asylum," abridging it only to the extent of the particular extradition, have any remedy for its destruction in the case supposed. If the paramount right of the accused to a trial to a final conclusion of the specific charge on which he had been extradited, and if his equally paramount right to return to the country of asylum on his acquittal of that charge, had been recognized and respected by the prosecuting state, and thereafter his extradition had been sought for the alleged subsequent offense, it being extraditable, we have not the slightest doubt and for the special reasons hereafter given in this brief, that the country of asylum after hearing and considering the evidence, would promptly decide *that it was entirely insufficient,* and refuse the further extradition of the accused. Now this is the protection of "the sover-

eign right of asylum," and the treaty secures it to the accused. It is not exhausted and extinguished on the first extradition, for that is special and limited, leaving the accused by fiction of law, still within the protection or territory of asylum, against arrest, or trial, or prosecution on *all* other charges, extraditable or not, committed before or after the extradition surrender, with the condition subsequent, however, that he must actually return to the country of asylum within the time limited, or he waives the protection of the right of asylum. It cannot be possible that the *treaty* is so absurd and self-stultifying as to put it within what is practically the exclusive and absolute power of the state opposed to the asylum, to say by means of a subsequent prosecution for an alleged subsequent offense, or by any other scheme, whether the right of asylum and the right to return to the country of asylum, shall or shall not be available to the accused. It must be borne in mind that the asylum and right of asylum pertain alone to the sovereignty of the foreign nation,—the nation conferring the right on the accused, and reserving it to him against every charge and prosecution not within the scope of the particular extradition; and no other nation, and surely not a state that is not sovereign and is no nation, can be permitted to determine whether the asylum of the foreign power shall or shall not be maintained and perpetuated in favor of the accused, nor decide adversely to it by detaining him on another extraditable charge, and then determine the question for the sovereignty of the country of asylum, the latter the only authority, according to

the *treaty*, competent to decide it. This can no more be done by means of a subsequent prosecution on the charge of committing a subsequent offense, than it can be done in any other manner that may be supposed. Where there is a treaty of extradition, and pursuant to its terms, a person is extradited on a specific charge, there exists and there continues to exist in right of the sovereignty granting the extradition, an asylum from which he has been taken; and there is vested in him the paramount right to return to the protection of the country of asylum, without interruption, detention, interference or molestation (no matter what the source), on his acquittal or other final termination of the extradition cases, in his favor. He may return at once or within a reasonable time. It would manifestly be an interference with, and an obstruction as well as an infringement of this right, and of the paramount right to a trial and to an opportunity of procuring an acquittal in the extradition case, to intercept its due and regular course, in its orderly progress to a trial to a final conclusion, by arresting the accused in violation of the supreme authority of the warrant of extradition, and by placing him on trial, and prosecuting him to a final conclusion, to conviction and sentence on the altogether different charge of committing a subsequent offense, to say nothing of the flagrant violation of the fundamental and supreme right derived from the *treaty*, to a trial of the charge on which he was extradited, before being subjected to any other trial or prosecution on any other and different charge.

6. By the implied requirement of the *treaty*, and

of Section 5275 of the Revised Statutes of the United States, and by international law, the accused must be brought to trial to a final conclusion on the charge specified in the extradition proceedings, *within a reasonable time,* or jurisdiction over his person ceases to exist, and the warrant of extradition is in law no longer authority for his detention in custody. This doctrine of the law is indispensable for the protection and enforcement of the right to return to the country of asylum, and to maintain in its integrity against encroachment and impairment, the reserved "right of asylum," constructively extended to the accused by fiction of law, against his arrest, trial, prosecution and conviction on any and every charge extraditable in character, alleging the subsequent commission of a subsequent offense and one within the treaty enumeration. What is a reasonable time will usually be determined by analogy, more or less persuasive, to the *lex fori*, in this case the law of the State of California. According to the law of that state, as declared by the decision of its Supreme Court in the *habeas corpus* case of *Ex parte Begerow*, 133 Cal.. 349, the period of sixty days is the limitation prescribed, and as held in that case, this period of limitation applies as fully to a case where the jury have disagreed, as it does to one that never has been brought to trial at all. The value of the right of the accused consists in the benefit it confers. To unnecessarily postpone the benefit of the right is to *pro tanto* deny it, if the postponement is made beyond the period reasonably necessary to bring the extradition case *to trial to a final conclusion.* This is self-evident. Perhaps an unnecessary postponement for a week or ten days

would be winked at; but in principle it is vicious and should not be tolerated. Says Mr. Justice Bradley, speaking for the court in *Boyd* v. *United States*, 116 U. S., 635:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be '*obsta principiis.*'"

This is strongly applicable to rights of an accused person, conferred upon him by a treaty of extradition. It is the law of California, as laid down in the *Begerow case*, and on constitutional grounds that when the accused is not brought to trial within sixty days after the disagreement of the jury, the indictment becomes *void*, and the jurisdiction over his person is at an end; further, that he is entitled to his discharge on *habeas corpus*. If there is good cause for the delay, it is held in the same case, to be incumbent on the state to establish it *affirmatively* on the record. There is no such showing in this case, nor could there be, for, as established most positively by the record, the state unlawfully substituted the second charge of perjury for the extradition charge, and on the second charge brought the

accused to trial, within the sixty days after the jury had disagreed in the extradition case; and surely this proves that the latter case, the extradition case, could have been brought to trial within the same period, if the prosecution of it had not been unlawfully *discontinued*, and the second charge of perjury unlawfully substituted for it. We certainly do not see how we could justly or reasonably be expected to furnish any further proof than this; and we are at a loss to understand why the Supreme Court of California states in its opinion that we furnished no evidence on the subject, when, as shown clearly by the record, the facts above adverted to, appear affirmatively in the case, and appeared as is disclosed by the record, at the time the opinion of the court was prepared, *and are stated in that very opinion.* If there was any reasonable or good cause for the delay in prosecuting the extradition case to trial to a final conclusion, it was incumbent on the state to establish it affirmatively on the record.

> "It is enough," say the court in the *Begerow case*, "for the defendant to show that the time fixed by the statute had expired, and that the case had not been postponed on his application. If there was any good cause for holding him for a longer time without a trial, it was for the prosecution to show it." (*Ex parte Begerow*, 133 Cal., 349.)

And the court ordered the prisoner discharged on *habeas corpus*, because he had not been brought to trial within sixty days *after the disagreement of the jury.* The case involved a charge of murder, and the opinion of the court by Mr. Justice Temple is a very learned and exhaustive review of the law, on

constitutional grounds. Mr. Hughes in his work on Criminal Law and Procedure, at Section 2567, says:

> "Where the prosecution holds and continues a cause beyond the statutory limit against the objection of the defendant, the indictment becomes null and void, and the defendant is consequently entitled to be discharged."

Such, too, is the view of Hawley in his work on International Extradition, page 12, where he says that unreasonable delay in the prosecution gives the accused the right to his discharge. There manifestly was *no jurisdiction* to arrest or try the accused on the second perjury charge, within sixty days after the disagreement of the jury in the extradition case, and, therefore, the subsequent conviction and sentence upon the unauthorized trial, are null and void, for want of jurisdiction over the person of the accused, on the second perjury charge. There can be no possible excuse offered by the State of California for the failure to try the accused on the extradition charge, for *three years* and more, to a final conclusion, unless it be that he has been prosecuted, convicted and sentenced on the substituted charge; but manifestly that is no excuse. To keep an extradited person imprisoned for years in defiance of his constant protest, without trial to a final conclusion of the charge on which his extradition was granted, is not only a flagrant violation of the *treaty* and of Section 5275 of the Revised Statutes of the United States, but is clearly the very extreme of governmental oppression. No such arbitrary and despotic power resides in any official or department of the state or of the United States. As very convincingly shown in the able opinion of Mr. Justice Temple,

speaking for the court, in *Ex parte Begerow,* 133 Cal., 349, to unreasonably delay the trial of an accused person, is a palpable violation of Magna Charta, and *habeas corpus* is the proper remedy to secure him his liberty in such a case.

7. By the terms of the convention of 1889, in Article 6, the extradition is to be "carried out" according to the laws in force in the surrendering state. Both Canada and Great Britain require that the warrant of extradition (the sole and supreme authority for the custody of the accused), shall direct that the agent of the United States receiving the accused, "convey him within the jurisdiction of the United States and there place him in the custody of any person or persons appointed by the said United States to receive him, for which this shall be your warrant." And the copy of the warrant appearing in the record so reads. *The sheriff of San Francisco was never so appointed;* consequently the warrant of extradition appearing in the record gives him no right to the custody of appellant and plaintiff in error, even assuming that the warrant is not legally devoid of further authority by reason of the failure to give the accused a trial to a final conclusion within a reasonable time, on the extradition charge. Whatever the efficacy and authority of the extradition warrant as process controlling the jurisdiction over the person, it is of necessity paramount to and supreme over all process emanating from the State of California, and controls and is the sole and only authority recognized by law, for the imprisonment of the accused, while it remains in full force and effect. As correctly said by Judge Benedict:

> "The person of the prisoner is not within the jurisdiction of the United States by virtue of any warrant issued out of this or any court. The prisoner was brought within the jurisdiction of the United States by virtue of a warrant of the executive authority of a foreign government, upon the requisition of the executive department of the government of the United States." (*United States* v. *Caldwell*, 8 Blatchf., 133.)

It is, of course, a warrant of such high and comprehensive authority that it continues to control the *jurisdiction* over the person of the accused, to the exclusion of all other jurisdiction (particularly a subsequent prosecution on an alleged subsequent offense) until its authority has served its purpose in the final termination of the extradition case, and in the execution and enforcement of the requirements of the *treaty*, the supreme law of the land, unless it has previously expired by reason of the failure to bring the extradition case to trial to a final conclusion within a reasonable time. In any event, when the extradition case is ended and the warrant has expired, and the accused is finally released, on the extradition charge, he is entitled to "depart in peace" and return to the country of asylum, free from detention or molestation, no matter from what source it may come. The international character of the warrant of extradition gives to it precisely the same supremacy and consequent precedence over the laws and judicial proceedings and prosecutions of the state as is possessed by the *treaty*, and by Section 5275 of the Revised Statutes of the United States. If the sheriff of San Francisco can take the custody of the accused, upon the extradition war-

rant, even though the warrant does not run to him, and he is not appointed by the United States for the purpose, then any person, no matter who, has the power and may hold the accused in custody, and the control and supervision intended by the supreme law to remain with the United States, and to be actually exerted by specific appointment of a custodian, would perish of its own inertia. The truth of the matter is that some one in authority, supposing that the warrant of extradition possessed no further effect after the accused was brought within the state, turned him over to the local power of the sheriff, together with a local bench warrant from the state court, directing the sheriff to arrest and hold him; this with the result that the warrant of extradition was left hanging *in nubibus*, until some one else in authority suddenly discovered that only the warrant of extradition could detain and lawfully hold the accused in custody in the extradition case; then for the first time (and the record discloses it), and during the pendency of the *habeas corpus* proceeding before the state Supreme Court, what purports to be a *copy* of the warrant of extradition was obtained from Canada by the state authorities, and set up in the return to the writ. Of course, the idea that a bench warrant of the state court could reach the custody of the accused, who was held under the supreme and necessarily exclusive authority of the warrant of extradition, was thoroughly absurd. Anyway the sheriff never saw the original warrant of extradition, it being held by Gibson, the agent of the United States, and subsequently by the chief of police of San Francisco. The sheriff never received the copy referred to, as appears on the face of the

certificate on the copy, until after the writ of *habeas corpus* had come up before the state Supreme Court for hearing on the return made. The state Supreme Court in its judgment directs the sheriff to hold the accused on the warrant of extradition; but clearly the court has no power to thus or at all appoint the sheriff for the purpose. The warrant requires and the law of both Canada and Great Britain requires that the necessary appointment be made by the United States and it has not been so made.

8. The *extradition* being for the sole and only purpose of giving the accused a trial to a final conclusion upon the specific charge on which he was extradited, and such being the requirement of the *treaty*, by necessary implication from its very nature, it follows that the only authority for the custody and the imprisonment of the accused is the international *warrant of extradition*. This warrant or process, controls to the exclusion of any and every other process, the custody of the person extradited. All this is self-evident. Now, the *law* constitutes a part of the contents of the warrant of extradition, just as essentially as if written therein in express words, instead of being there by necessary implication. Therefore, the extradition warrant is to be construed precisely as if in terms explicit and absolute it provided that the accused shall be held in custody

> "for the sole and only purpose of his trial to a final conclusion and within a reasonable time, upon the specific charge herein designated, and upon which his extradition is granted, and upon no other charge shall he be brought to trial or prosecuted, until after he has first had a reasonable time and opportunity subsequently to his

> final release or trial upon said charge on which he is hereby extradited, to return to the country granting his extradition, and has failed so to do. And provided, further, that at no time prior to said expiration of his said right to return, shall he be prosecuted or imprisoned nor placed on trial, for or on account of any charge whatsoever, other than the charge in this warrant designated as aforesaid, and for which and upon which this extradition has been granted."

These are the provisions which, according to all the authorities, the law of the *treaty* of 1842 and of Section 5275 of the Revised Statutes of the United States and international law import by necessary implication into every warrant of extradition. The process must be so construed accordingly, and *the imprisonment of the accused must be restricted and confined to these implied terms and conditions of the extradition warrant;* every different imprisonment is consequently null and void, is in violation of both the treaty and the statute, and must be so adjudged.

IV.

JURISDICTION TO DECIDE QUESTIONS RAISED.

In the first place, as to the jurisdiction of the Supreme Court of the United States. Jurisdiction of the *appeal* from the United States Circuit Court is conferred by Act of Congress, and is thoroughly established. In the extradition case of *Rice* v. *Ames*, 180 U. S., 374, the Supreme Court say:

> "As a construction of the extradition treaty with Great Britain is involved, the appeal was properly taken to this court."

And in the extradition case of *Pettit* v. *Walsh*, 194 U. S., 205, 216, the court made a similar ruling. Both were *habeas corpus* cases. There is, however, an important difference concerning the extent of the jurisdiction, between an appeal and a writ of error. Say the court:

> "By a writ of error only questions of law are brought up for review, as in actions at common law, while by an appeal, except when specially provided otherwise, the entire case on both law and facts is to be reconsidered; there seems to be little doubt that, so far as it is essential to a proper decision of the case" (*habeas corpus*) "the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge." (*Ex parte Neagle*, 135 U. S., 1, 42.)

We concede that on the writ of error the court has no authority to review the decision of the state Supreme Court on questions of fact.

> "In proceedings in this court to review the action of state courts, we do not enter into a consideration of questions of fact." (*Gardner* v. *Bonesteel*, 180 U. S., 362, 370.)

Accordingly, upon the appeal from the judgment of the United States Circuit Court refusing the writ of *habeas corpus*, we bring up the entire case, both the law and the facts, for review, but on the writ of error to the state Supreme Court we present for determination questions of law only, and have made no attempt to bring up the evidence. The opinion contains the court's findings of facts. That the Supreme Court of the United States has plenary jurisdiction to consider and determine the questions of law presented on the writ of error is a proposition amply sustained by the provisions of Section 709 of

the Revised Statutes of the United States, and by the court in *Ker* v. *Illinois*, 119 U. S., 436; *Pepke* v. *Cronan*, 155 U. S., 100; *Fitts* v. *McGhee*, 172 U. S., 533, and many other cases.

All the federal questions presented in this brief were specially raised and the treaty and Section 5275 of the Revised Statutes were specially claimed and set up in that behalf by the appellant and plaintiff in error in both the courts below (federal and state), and were decided adversely to him, and all these matters appear affirmatively in the record on the writ of error and in the record on the appeal; and so far as the writ of error is concerned, the facts disclosed by the record bring the case fully and completely within the provisions of Section 709 of the Revised Statutes of the United States. The record shows that the federal questions were not only raised and decided in the state Supreme Court, but were also raised and decided in the state Superior Court, adversely to the appellant and plaintiff in error and to the claims he set up on the basis of the treaty and the statute.

V.

JURISDICTION AND DUTY OF THE UNITED STATES CIRCUIT COURT TO GRANT HABEAS CORPUS.

In the next place, as to the jurisdiction and the duty of the United States Circuit Court to grant in the first instance the writ of *habeas corpus* on the showing made, it must be borne in mind that no evidence was offered to support the answer and return. (Rec., 19.) The Circuit Court fell into the

error of applying to our case the general rule declared in *ex parte Royall*, 117 U. S., 241, instead of enforcing the exception recognized in that and subsequent cases, where the imprisonment is alleged to be in violation of a *treaty* of the United States. In the *Rauscher case*, 119 U. S., 407, the court cited *ex parte Royall* as sustaining by the exception there specified the *right* to *habeas corpus* out of the United States Circuit Court, not simply a matter of discretion, in cases where the prisoner claims that he is restrained of his liberty in violation of a treaty of extradition; and explicitly held that this right entitled the party to the writ of *habeas corpus*, to be issued in the first instance out of the Federal Court, and without putting the petitioner to the necessity of seeking his remedy in the state court, and thence by writ of error to the United States Supreme Court, as required by the general rule.

This same exception to the general rule was referred to and approved by the court in *Whitten* v. *Tomlinson*, 160 U. S., 231, 241.

Mr. Justice Gray, delivering the opinion of the court and pointing out that cases involving *treaties* between the United States and foreign nations, as in *Mali* v. *Hudson County Jail Keeper*, 120 U. S., 1, were to be regarded as cases of "urgency" within the meaning of the exception to the general rule requiring the prisoner to first seek his remedy in the state courts and thence by writ of error to the Supreme Court of the United States.

See, also, *Cohn* v. *Jones*, 100 Fed. Rep., 639.

Then Mr. Spear, in his treatise on extradition, states that the prisoner held in violation of an ex-

tradition treaty is entitled to his release on *habeas corpus* from the Federal Court (Spear on Extradition, pp. 233, 234). The rule is stated somewhat differently in the treatise or rather essay of Hawley on Extradition. After saying that the prisoner cannot lawfully be held on a charge other than the one specified in the extradition proceedings, and that if he is so held, he is entitled to his release on *habeas corpus*, states:

> "If the state courts should refuse to discharge him on his plea in abatement or *habeas corpus*, he may then sue out a *habeas corpus* from a Federal court." (Hawley on International Extradition, p. 12.)

Even under this statement of the rule the appellant was entitled to the writ of *habeas corpus* from the United States Circuit Court, for at the time he applied to that court, as the record here shows, he had exhausted, and without success, every remedy, including plea in abatement and *habeas corpus*, in the state courts unto the highest court of the state. This entitled him under the ruling in *Minnesota* v. *Brundage*, 180 U. S., 499, 505, to the writ of *habeas corpus* from the United States Circuit Court; and according to the doctrine of that case it was an abuse of discretion to refuse it.

The case last cited was not a case of "urgency," such as one involving the violation of an extradition treaty, but the court said:

> "As disclosed by the record, the case, we repeat, is not one of urgency within the meaning of our decisions, and does not suggest any adequate reason why the appellee should not be required *before* applying to the Circuit Court of the United States to be discharged upon *habeas*

> *corpus*, to seek at the hands of the higher courts of the state a reversal of the judgment rendered against him in the Municipal Court of Minneapolis. Without expressing any opinion as to the validity of the Minnesota statute, the judgment of the Circuit Court must be reversed, with directions to dismiss the application for a writ of *habeas corpus*, without prejudice to a renewal of it when the appellee shall have exhausted the remedies provided by the state for a review of the judgment of the Municipal Court of Minneapolis."

Now, that is precisely what we did in the state courts, both by appeal and *habeas corpus*, *before* applying to the United States Circuit Court in the case presented by the record on this appeal; and we did all this because the United States Circuit Court required us to do it. (154 Fed. Rep., 980.)

We fully exhausted every remedy provided by the state, and yet the Federal Court denied us the benefit of the writ of *habeas corpus*. So that whether the case is reviewed as being one of "urgency" within the exception to the general rule referred to (and it certainly comes within the exception relative to treaties, and is a case of "urgency") or is viewed as being within the doctrine above quoted from *Minnesota* v. *Brundage*, the appellant is entitled to the writ of *habeas corpus*, on the showing made, from the United States Circuit Court. The case *In re Frederich*, 149 U. S., 77, cited in the opinion of the Circuit Court, was not a case involving the violation of a *treaty*, and therefore is not in point.

It must be very evident that there exists a case of "urgency" requiring the intervention of the ju-

diciary of the Federal government, in the exercise of the original jurisdiction conferred by the constitution, whenever and wherever by means of imprisonment a violation of a solemn public *treaty* has been committed by or through the agency of one of the states; and this to the end that the *status quo* be speedily restored, and the relations of amity and concord, as well as the good faith existing between the United States and other nations, and the integrity of the *treaty*, be preserved and maintained inviolate against infringement by a state government having no responsibility whatever to the offended nation, but involving the United States in international conflicts and complications, without its privity or its fault. The peace, the honor and the good faith of the nation, and the due performance of international obligations which it has assumed, cannot be made to rest on the exceedingly precarious basis of a vindication and protection from a state government.

This is the admonition of American history and needs no discussion. The international responsibility is alone with the United States as being inseparable from its possession of the national sovereignty; the corresponding duty of upholding the national faith and the national honor must primarily devolve upon the nation. It results that where rights judicial in nature and import are in controversy, and are derived from a public *treaty* with another nation, the duty is primarily cast upon the Federal judiciary to enforce the treaty, and the case is one of "urgency," especially if it is a case of imprisonment in subversion of the treaty. Say a learned court:

> "Whenever a right grows out of or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the state; and whoever may have the right, it is to be protected." (*Baker* v. *Shy*, 9 Heisk, 85.)

And Chancellor Kent says:

> "Treaties are to receive a fair and liberal construction according to the intentions of the contracting parties, and to be kept with the most scrupulous good faith." (1 Kent's Com., 174.)

These fundamental requirements are best enforced by the national judiciary rather than left to the delays and crudities of local administration, influenced and swayed by sympathies and prejudices antagonistic to the *treaty* and to the obligations it imposes, or perhaps, as in our case, antagonistic to the rights and to the protection it gives to the accused. Foreign nations in making treaties with the United States do not and under our system of government cannot know nor deal with the several states at all, nor give them a co-ordinate recognition. National sovereignty is vested exclusively in the United States. The Supreme Court has said:

> "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations; all of which are forbidden to the state governments." (*Knox* v. *Lee*, 12 Wall., 457, 555.)

It could not remove nor impair or lessen the duty of the United States Circuit Court to grant the writ of *habeas corpus* and on the showing made discharge

the prisoner; that the writ of error had been sued out and is in course of prosecution (*Eastern Association* v. *Welling*, 103 Fed. Rep., 352; *Tinsley* v. *Anderson*, 171 U. S., 103).

If the Circuit Court had granted the writ of *habeas corpus*, as it was required to do by law, and by the record before it, and had discharged the appellant from imprisonment, as was clearly its duty, there would have been no occasion to further prosecute the writ of error, and the questions it presents would have then become merely *moot* questions in the litigation, and for that reason not further justiciable. In addition to this, it must be very evident that the pendency of the writ of error is no answer to the contention that the appellant is entitled, *as of right*, to the writ of *habeas corpus* from the United States Circuit Court, issuing from the court in the first instance, and irrespective of whether or not he has exhausted all remedy in the state courts. It is a maxim of the law that *non potest adduci exceptio ejusdem rei cujus petitur dissolutio*. The supersedeas on the writ of error is directed against the judgment and not against the questions involved. Besides this, after he had exhausted all remedies in the state courts, and without success, and still being denied the rights given him by the *treaty*, surely he had then, if ever, the right to relief by *habeas corpus* issuing out of the United States Circuit Court. The law made it the duty of that court to grant him the writ and discharge him from imprisonment, thereby enforcing the *treaty*, as against its violation by the state,—a violation upheld and maintained by the highest

court of the state. The appellant complied to the utmost extent with all doctrines of comity and courtesy; he afforded the state and the state courts every opportunity to correct the wrong done; he did not (and the record here so discloses) interfere with the regular administration of the criminal law of the state, by interposing, nor seeking to interpose the process of the Federal Court while the criminal case was pending.

The functions of the state, respecting the case in all its phases, had finally terminated, and the rights and the protection he invoked under and pursuant to the *treaty* had been finally denied and rejected by the state and by its courts. Clearly, it was then, if ever, the *duty* of the United States Circuit Court to exercise its jurisdiction and to enforce the treaty, and upon the showing made issue its writ of *habeas corpus* and discharge the appellant from imprisonment; and do this in obedience to the supreme law of the land, and not remit the prisoner to the slow process of a writ of error.

There can be no doubt whatever that *habeas corpus* is the proper remedy. Say the Supreme Court of New York:

> "The further question is raised whether relief can be had by *habeas corpus*, and it is insisted that the only remedy available to the relator is in review of the judgment by appeal, and that at all events that remedy should first be exhausted."

The court holds to the contrary, and decides that *habeas corpus* is the proper remedy in a case of international extradition, where the accused is impris-

oned in violation of the treaty and of Section 5275 of the Revised Statutes of the United States.

The decision was affirmed by the New York Court of Appeals. (*People* v. *Stout*, 81 Hun., 341; *Ex parte Knight*, 48 Ohio St., 588; *Cohn* v. *Jones*, 100 Fed. Rep., 639; *Cosgrove* v. *Winney*, 174 U. S., 64; *Johnson* v. *Browne*, 205 U. S., 309; Spear on Extradition, pp. 233, 234; Hawley on International Extradition, p. 12.)

We pass then to the presentation of further facts disclosed by the record. The salient features of the case have already been stated in this brief; but it will be proper to go into more detail and further discussion, as tending to a clearer and more satisfactory understanding of the case; and of the questions presented.

VI.

FURTHER FACTS OF THE CASE AS DISCLOSED BY THE RECORD—DISCUSSION.

1. First as to the facts common to both the appeal and the writ of error: In the early part of July, 1905, the appellant and plaintiff in error departed from San Francisco and established his residence and domicile in Canada. Whether he sought refuge from relentless persecution and from irrepressible hostility, as well as protection from an evident determination on the part of state courts to deny him through prejudice and enmity the equal protection of the law, and whether he went in order to escape the power and influence of those arrayed against him and against his rights, are matters not

to be discussed here, however much they may justify him. Whether he can rightly say, "and if any tax me, as Laban taxed Jacob, 'wherefore didst thou flee away secretly, without taking solemn leave?'" And answer, as did he, "Because I was afraid," and that plain dealing patriarch who could not be accused of purloining a shoe latchet of other men's goods, confessed himself guilty of the awful felony that he "stole away" for his own safety, seeing Truth may seek corners, not as fearing her cause, but as suspecting her judges, are matters he cannot urge at this time, be they ever so well sustained by the circumstances inducing his departure. Says Lord Bolingbroke:

> "If to decline in certain circumstances a trial; if to go into voluntary exile, either before a trial or even after condemnation, were absolute proofs of guilt, the conduct of many greater and better men than the person now accused would deserve our censure, and that of calumniators as vile as these libellers would merit our approbation. Metullus and Rutilius must be condemned—Apuleius and Apicuis must be justified."

We might if it were necessary in rightful explanation of our action, refer to the sentiments expressed in the letter of Lord Clarendon, addressed to the House of Lords, defending his departure from England when under impeachment; and we might well invoke the reasons given by him why a man unjustly accused should evade meeting an unscrupulous prosecution. (Compare Lister's Life of Clarendon, Vol. 3, p. 415, *et seq.*) The most innocent person may deem a trial too great a risk to encounter. He may be assured that powerful and

wealthy individuals have resolved on his ruin, and that witnesses have been suborned to bear false testimony against him; and he may rightly discern an absolute impossibility of securing a fair and impartial trial and the equal and just protection of the law. What is he to do? Must he go forth and meekly submit to the destroying condemnation prepared for him, no matter how innocent he may be? The criminal law of a state has often been used as an engine of private vengeance; must he willingly respect its authority because it wears the sacred form of law, and permit himself to be the victim, making no effort for his own protection against the power and influence of his enemies? Self-preservation, the very highest of laws for the security of the individual, amply vindicates on the very strongest principles of justice the right of another country to extend to the persecuted and oppressed the protection of its sovereignty. While government protects the citizen, it is his duty to render himself amenable to its jurisdiction; but when its great powers are being despotically abused and perverted for the purpose of his destruction, he is not only justified by the higher law, but it is a duty resting upon him with its obligation inherent in nature, to seek his safety and welfare in the sovereignty of another nation, competent and willing to extend him adequate protection. On this foundation is built the American commonwealth; historically it is the fundamental doctrine of the republic.

After the appellant and plaintiff in error had, as stated, established his residence and domicile in Canada, there was filed against him in the Superior

Court of San Francisco an indictment purporting to charge him with the crime of perjury in verifying by his oath before a notary public his answer and plea to a complaint filed in the civil department of the same court, in May, 1905, in a suit for alimony and permanent support, the gist of this perjury charge being that in his answer and plea he falsely made denial of the averment of the complaint that he had married the plaintiff in the suit, one Charlotta Newman.

This civil suit is still pending and has never been brought to trial, so absolutely without merit is it; it was at issue and ready for trial in June, 1905. It fairly and squarely presented for decision the question whether the accused ever married the plaintiff. The legitimate and decent, and according to the ethics of the legal profession, the only respectable course of procedure would have been to procure *in the civil suit* a judicial determination of the issue as to the truth or falsity of the denial in the answer, of the averment of marriage, instead of resorting to the oppression of the criminal law by means of a charge of perjury, and pursuing against the defendant a system of relentless persecution designed simply to destroy him;—the insatiable lust of revenge that has made "countless thousands mourn," and given cause to almost believe with Ruskin, that the race is still half-serpent, not extricated from its clay; a lacertine breed of bitterness,—the glory of it emaciate with cruelty and inhumanity, and blotted with venomous stain; and the track of it, on the leaf a glittering slime, and in the sands a useless furrow.

In the month of October, 1905, the appellant and plaintiff in error was, upon the demand of the United States, and pursuant to the *treaty*, extradited from Canada, for the sole and only purpose of being placed on trial upon the specific charge of perjury, wherein he was accused of falsely taking oath before a notary public in verification of his answer and plea to the complaint in the civil suit above referred to,—the denial going no further in law than tendering issue upon the averment in the complaint that he had married the plaintiff. In due course, and about thirty days after the surrender in extradition, he was placed on trial in the Superior Court of San Francisco, on this specific charge of perjury on which he had been extradited. On December 22, 1905, the jury in the case having heard the evidence, *disagreed* and were discharged. The case was then again set down for trial on an early day in the following month, but before the day selected arrived, and on December 29, 1905, *another and different indictment* was found and filed against appellant and plaintiff in error, in the same Superior Court, purporting to accuse him of another and altogether different offense of perjury, to wit: in testifying as a witness in his own behalf, on the trial or rather mis-trial of the extradition case, that the parties to a certain marriage *ceremony* were himself and Agnes Newman, the indictment charging that this was false in that the *ceremony* (not the marriage, as in the first indictment) was with said Charlotta Newman. Both the indictments are in the record on the writ of error.

It should, perhaps, be explained, in passing, that, among many other points, the accused contended, as is the fact, that previously to the marriage ceremony in dispute he had legally married Agnes by common law marriage, and that, she afterwards desiring a religious ceremonial, he, in order to gratify her wish, arranged for the subsequent ceremony, which occurred with *her* and not Charlotta Newman, who was simply, at the instigation of others, wickedly taking advantage of a mistake or error in the certificate, caused by transposition of or a mistake in the names —one being a principal and the other (Charlotta Newman) a witness to the ceremony. And that, in any event, the valid pre-existing marriage with Agnes rendered absolutely null and void any subsequent ceremony had it occurred with Charlotta Newman; such not only being the rule of the common law, but the express declaration of the California statute; that, therefore, any false testimony (there was none) that the *void* ceremony occurred with Agnes and not with Charlotta Newman, being no evidence of a marriage, was as held by all the authorities on the point, both in England and the United States, *no perjury*. The California courts avoided the necessity of so deciding by simply ignoring the point, and passing on the case upon the assumption that the ceremony was a valid instead of a void marriage with either woman,—a very flagrant instance of *petitio principii*. We are not permitted to here suitably criticize this indefensible action on the part of the state courts, and must be content with merely stating what was done. Now, the prosecution considering it would be easier for them to

produce evidence as to the marriage ceremony than it would be to show that the accused *married* Charlotta Newman,—the pre-existing marriage to Agnes preventing,—dropped the extradition charge, which required them to prove a *marriage,* and substituted the second charge of perjury, which merely required them to produce evidence of a mere ceremony; and the accused was not even permitted by the state courts to show that this ceremony, had it occurred with Charlotta Newman (and it did not), was absolutely null and void by reason of the pre-existing and perfectly valid marriage to Agnes; therefore, testimony relative to the ceremony could not be perjury. (2 Wharton Crim. Law, Sec. 1282.) There were many other fatal defects in the evidence in the extradition case besides this one of failure to prove a marriage as differentiated from a mere marriage ceremony, which was provable *prima facie* by what was in fact an erroneous certificate. The defects in the proofs in the extradition case were sought to be obviated by the prosecution in having recourse to the second perjury charge; besides, it was also thought by the prosecution that it would serve to effectually dispose of and get rid of the extradition and of the rights and protection conferred on the accused by the *treaty*, by Section 5275 of the Revised Statutes of the United States and by international law; and all this by the simple method of dropping and discontinuing the active prosecution of the extradition case and substituting the second perjury charge on which and in respect to which there had been no extradition.

At the time set for the next trial of the extradi-

tion case, to wit: in January, 1906, the prosecution, manifestly intending to substitute the second perjury indictment for the extradition charge, sought from the state court a postponement of the trial of the latter, and the court, over the objections and protest of appellant and plaintiff in error, based on the treaty and the federal statutes, granted the postponement to various successive dates, until finally the second perjury indictment was at issue and on the trial calendar of the court in February, 1906, when, over his objection, expressly predicated on the rights conferred upon him by the *treaty* and by Section 5275 of the Revised Statutes of the United States, all of which is shown by the record, this second charge of perjury was, on motion of the prosecution and by order of the same court, and within sixty days after the disagreement of the jury in the extradition case, actually placed on trial in substitution of and to the exclusion of the case in which and the specific charge upon which he had been extradited; *and despite the fact that he was at the time held under the supreme authority and exclusive jurisdiction of the international warrant of extradition.* The further prosecution of the extradition charge was discontinued, although appellant and plaintiff in error demanded of the state court and of the state that he be first given a trial to a final conclusion of the extradition case. This demand was refused. The record, both on the appeal and writ of error, is very clear on all these matters. He was convicted on the second perjury charge, and, against his objections, expressly based on the *treaty* and on Section 5275 of the Revised Statutes of the

United States, he was, on this second charge, sentenced by the trial court to imprisonment in the penitentiary for the maximum period of fourteen years,—certainly not very suggestive of fairness or moderation in the proceedings. In fact, the accused was not given a fair trial; and the adverse result was only attained after depriving him of the protection of those fundamental rights which the law secures to every person accused of crime; and amply justified the reasons which induced his departure for Canada, as a proper and necessary course in self-defense against persecution, oppression, and the power and influence of his enemies. It would not be proper to go on in this brief and direct attention to the personal animosities and difficulties existing between the accused and his judges; perhaps—and he deferentially ventures the suggestion,—it would have been more to the interests of justice if the enmity prevailing against him had acknowledged its prejudice and refused to sit in the case. He is told that his "professional activity" is to be blamed for much of the hatred existing; but, without going into the merits of the matter, as that is prohibited him, he is sure of the rectitude of his conduct and of his intentions. If he was seemingly offensive because thought too aggressive in the defense of the rights of his clients, his professional zeal should not be set down to malice; he never stopped, it is true, to consider how strongly entrenched or exalted in power were those whom duty required him to attack; and in consequence, no doubt, his conduct has brought resentment and inspired revenge from the powerful and influential. However, the subject is one that he

is not allowed to discuss. He realizes that it makes no difference; it is not a matter involved in this case; yet it would have been better if these things did not exist; and it would have been better if the judge whose impeachment he had sought some time previously, when occupying other judicial office, had not cast the deciding vote in the court of appeal in affirming the conviction on the second perjury charge. It is only important here to know that, so far as the State of California is concerned, the conviction and sentence are final; nor can it make any difference that the main points urged by him for reversal of the judgment were not the subject of the decision in the District Court of Appeal; if they were the results might have been different. It is but natural that he should resist and complain, for great wrongs have been done him. Nor is it important to know, in this case, the reasons why he was refused by the state Supreme Court a review of the decision of the District Court of Appeal. Neither can it make any difference that, on retiring from office and in his final message, the governor of the state went considerably out of his course in an attempt, while the case was before the courts, to influence the final results of the prosecution adversely to the accused, and did so by means of a most scurrilous and libelous attack upon him, making it necessary for the senate of the state to do him the justice of spreading his reply upon its official minutes. (Journal of Senate of California, 37th Session, January 24, 1907, page 2.) While all these things are a part of the history of the case and are matters of common notoriety, and give complexion to the liti-

gation, yet he must concede they furnish no useful analogy nor illustrate any principle of law pertinent to the questions here presented. The public press went to incredible extremes in its libelous and infamous abuse of the accused; and in its intimidation of jurors, till the very atmosphere of the state courts became surcharged and vibrant with malignant and powerful prejudice against him and against his legal rights. There is such a thing in California, at least in San Francisco, as government by newspaper supplanting government by law. This interference by irresponsible newspapers with courts and jurors in the administration of the law is surely a strange and portentous despotism, and combines two most fatal elements of tyranny, popularity and an enmity to all individual excellence. We need hardly say there is no good cause for this prejudice against the accused; and it would make no difference if there was. He had attained some prominence in his profession. He came to be considered, more than any one else, the sponsor, in criminal cases especially, of what the extremely learned editors of the public press derisively, in the plenitude of the conceit of ignorance, very abusively criticize and hysterically attack as the "technicalities" of the law,—a something beyond their comprehension, and, therefore, to be hated and despised, especially when resulting in the rightful liberation of those whom the newspapers have persecuted or vilified in scurrilous and sensational paragraph or editorial, or against whom they held a special employment to calumniate and libel. There is no worse menace to the stability of American institutions than the toleration by the

judiciary of newspaper interference and even dictation in the trial and decision of cases; and we have always vigorously resented it, as we were in duty bound. For these reasons, and because, also, we had in the practice of law forced many in "high places" to make just reparation for wrongs perpetrated, and did not hesitate to expose and condemn the very censurable deficiencies of the local bar, we have at least succeeded in bringing upon our earnest efforts in the performance of duty the penalty of making many enemies, yearning for our retirement to perpetual oblivion. There are those who have an inherited faith in the efficacy of the criminal law as an engine of individual extermination, and our enemies seem to be of that hereditary taint.

Three years and more have elapsed, and yet no trial to a final conclusion of the extradition charge; and still, according to the decision of the state Supreme Court on the writ of *habeas corpus*, we must continue in custody, indefinitely, and perhaps perpetually, under the warrant of extradition, even unto taking its authority and dignity (but denied its protection) along with us into the oblivion of fourteen years' burial in a California penitentiary, if the state courts can have their way about getting rid of international extradition process, and of repudiating the high obligations of a solemn public treaty between two great nations. There is no reason whatever why the extradition case was not prosecuted to a trial to a final conclusion, instead of the second charge of perjury,—the non-extradition charge, except, as we have already pointed out, that the prosecution had *no evidence* to sustain the charge

on which the accused was extradited, and believed they could attain the much-desired result more easily and satisfactorily to themselves by substituting the other charge; and also supposed that in this way they could deprive the accused of the rights and of the protection conferred upon him by the treaty of extradition and by Section 5275 of the Revised Statutes of the United States.

It must be manifest that the state has been placed in the attitude of saying to the United States:

> "We want Mr. Collins extradited from Canada on a specifically described charge of perjury; we know we have not sufficient evidence to convict him on that charge. We, therefore, do not propose to bring him to trial to a final conclusion on that special charge; but we will extradite him and take the chance of his committing some other offense while we have him in custody under and upon the faith and the authority of the *treaty* and while we hold him by virtue alone of the obligation of the extradition process to give him the required trial to a final conclusion on the charge therein specified, *which we will not do.* If, perchance, he commits some subsequent offense, or if we can contrive to make it appear that he had done so and such, too, is our purpose, then, while the extradition case is pending and awaiting final trial we will arrest, prosecute and convict him of committing an offense subsequently to his surrender in extradition, and give him the extreme penalty, dropping the extradition case, and resting satisfied with the results."

Now, we ask, in all earnestness, could a worse fraud than this be perpetrated on the *treaty*, and on the rights conferred by the treaty on the accused, if the United States was to lend its sanction

and its authority to such a scheme and secure the extradition? Yet this is precisely what has occurred in effect and results. Says SPEAR at page 82 of his treatise on Extradition:

> "The surrendering government, in every such case, would have no opportunity to pass judgment upon the evidence with reference to the question of its duty to make a surrender of the party for the crime for which he was tried. It would as to the purpose for which it did make the surrender, be cheated by what would be equivalent to an act of bad faith; and whether the cheat was deliberately planned, or was simply an afterthought, would make no difference with the fact itself. In either event, the purpose for which the delivering government, under the stipulations and obligations of a treaty, granted the custody, and which was avowed by the demanding government in making the requisition, would not be the one for which the custody would be used."

Nor can it for a moment be imagined that Great Britain or Canada, would grant the extradition if informed of the purpose contemplated, or if told of the scheme resolved upon by the state officials, and those aiding and abetting them to defraud both the treaty and the accused.

Say the Supreme Court of the United States:

> "The general scope of the two treaties," (referring to the Ashburton treaty of 1842 and the convention of 1889) "makes manifest an intention to prevent a state from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then, having obtained possession of his person to use it for another and different purpose." (*Johnson* v. *Browne*, 205 U. S., 309.)

A treaty is to be construed so as to exclude fraud

and to make its operation consistent with the highest good faith,—*uberrima fides*. (2 Wharton's Dig. Int. Law, Sec. 133.) The treaty furnishes both the facility and temptation to defraud itself, if we assume that a state having obtained the extradition of a person on a specific charge of crime, may then, in its discretion, or at its will prosecute him for some other crime or alleged crime, or may use the custody thus acquired for other purposes than the one purpose designated in the extradition proceedings. Nor does the fact that the second and non-extradition charge is also perjury, and alleged to have been committed by the accused in testifying to his innocence of the charge on which he was extradited, in the least degree mitigate or palliate, but on the contrary, seriously aggravates the wrong committed against the *treaty* and against the rights conferred, by the *treaty* and by Section 5275 of the Revised Statutes of the United States, upon him. Had he been given a trial to a final conclusion on the extradition charge, and acquitted on the ground that the matters assigned as perjury on that charge, to wit: his denial of a *marriage* to one Charlotta New man, were the truth, it would in law have been *res adjudicata* of the principal issue involved in the second charge, concerning the mere marriage ceremony (*United States* v. *Butler*, 38 Fed. Rep., 499; *Coffey* v. *United States*, 116 U. S., 436, 446; *Cooper* v. *Com.*, 106 Ky., 909); and the latter would necessarily fail. Surely, it is self-evident that if the accused was acquitted on the extradition charge, and he then in due time, returned to the country of asylum, neither Great Britain or Canada would grant

or consent to his extradition on the second perjury charge. It follows that what the state could not do directly, it has done indirectly, and by violating the *treaty*, by violating Section 5275 of the Revised Statutes of the United States, and by violating international law. Manifestly, it was the right conferred on appellant and plaintiff in error by the *treaty* to secure a trial to a final conclusion of the extradition case, and to thereby obtain in that case, and under the protection of the treaty, and of the law of the extradition, an adjudication which, in legal effect, would have effectually disposed of the very issue afterwards presented on the second charge of perjury; for had it been adjudged in the extradition case that the accused swore to the truth when, in the civil suit for alimony and support, he on oath denied he *married* this Charlotta Newman, the plaintiff in the suit, then in legal effect this adjudication would have also disposed of the relevancy of the question whether there had been a marriage ceremony with her, or with Agnes Newman; for the latter question as to the ceremony, so far as relevant, must necessarily be subordinate and subject to and is included in the ultimate question of marriage or no marriage with one woman or the other.

But *e converso*, an adjudication that the ceremony did or did not occur would be no determination that there was or was not a marriage.

If the scheme of dropping and discontinuing the prosecution of the extradition case, and thereby preventing the adjudication that would have precluded all further prosecution, and taking up in its stead, substituting for it, and prosecuting to a final con-

clusion, to conviction and sentence the second perjury charge, if this is not depriving the accused of the supreme rights and protection conferred upon him by the *treaty*, and by the Federal statute—the right to a trial to a final conclusion of the extradition case, to the exclusion of every different prosecution, and the right to return, without detention, interruption, or interference, to the country of asylum, to "depart in peace," on his acquittal of the charge upon which he was extradited, and of his right to obtain an acquittal, then it must only be because the fraud attempted is impossible of being accomplished. The violation of a right conferred by the treaty is a violation of the treaty. The treaty must first be obeyed. Any other doctrine would open wide the door to all sorts of schemes and devices in fraud of the treaty, and of the rights it confers on the extradited prisoner. If a new and glaringly revolutionary doctrine is to be declared in repudiation of the treaty itself, and to the effect that the commission of a subsequent extraditable offense deprives the accused of his supreme right in execution of the treaty, to a trial to a final conclusion of the charge on which he was extradited, and of his equally supreme right to return to the country of asylum, on his acquittal of the extradition charge, and of his right to procure such acquittal, it would be well to first stop and consider that the *treaty* gives the sovereignty granting the right of asylum, a very controlling interest and authority in determining whether there is *prima facie* evidence that the subsequent offense was committed;—a matter already fully discussed in this brief, and again here-

after presented in citing the authorities in the part assigned more specifically to the argument, under the heading or title "Further Argument on Main Propositions. Fundamental Principles of the Law of International Extradition," and the succeeding chapters of the brief. Nor is it to be supposed that the courts will take it upon themselves to thus defeat the treaty and radically change the law; and in any event, even if they did, the objection still remains that no subsequent prosecution on an alleged subsequent offense is possible until *after* the final termination of the extradition case; and this, on jurisdictional grounds, also in this brief, already explained *in extenso*. The principle is that the extradition jurisdiction is derived from the treaty, the supreme law of the land, and like the treaty, is supreme and paramount, and therefore exclusive; in addition to this, it is the jurisdiction *first* resting over the person of the accused, and for that reason also has precedence to the exclusion of any and every other and different jurisdiction. Say the Supreme Court of the United States:

> "It is a principle of universal jurisprudence that where jurisdiction has attached to a person or thing, it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function." (*Taylor* v. *Taintor*, 16 Wall., 370.)

All of which is quite axiomatic. The fundamental requirement of the *treaty* is that the accused must be given a trial to a final conclusion of the extradition charge, within a reasonable time, and to the exclusion of any other charge. Not until this is done and the extradition jurisdiction terminated, is it

possible to acquire any other jurisdiction on any other charge, over the person of the accused; and we insist that even then, no further and other jurisdiction can attach until he is first afforded a reasonable time and opportunity to return to the country of asylum, and fails to avail himself of the right. It may be a very convenient thing to hold him and prosecute him on an alleged subsequent extraditable offense, and arbitrarily cut off the right of asylum, as well depriving the nation of asylum of its prerogative in right of its sovereignty to first determine from the evidence adduced whether there is sufficient *prima facie* proof to indicate that the subsequent offense was committed and is not fictitious or merely a pretext or a subterfuge; and it may be, as suggested by the court below, that if the accused is permitted to avail himself of his legal and paramount right to return to the country of asylum he can for the time being and perhaps permanently make good his escape, and the "offended law" totter to its fall for want of vindication in the special case,—though we may be permitted to doubt it. We do not see how such considerations can properly influence the judicial mind, nor cause a court to halt and turn back from the performance of its manifest duty to follow the law. Says Mr. Justice STORY in the case of *The Isabella,* 6 Wheat., 72:

> "This court is bound to give effect to the stipulations of a treaty in the manner and to the extent which the parties have declared and not otherwise. We are not at liberty to dispense with any of the conditions and requirements of the treaty or to take away any qualifi-

> cation or integral part of any stipulation, upon any notion of equity, or general convenience, or substantial justice."

The Supreme Court of the United States, in a recent case of international extradition, very forcibly said:

> "While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought, by doubtful construction of some of its provisions, to obtain the extradition of a person for one offense and then punish him for another and different offense." (*Johnson* v. *Browne*, 205 U. S., 309.)

If the subsequent offense is extraditable, the accused may be prosecuted, but, as rightly should be, only upon the authority of a *new* extradition; if not extraditable, then the *treaty* by omitting the offense from the enumerated list, from highest considerations of international policy, and in deference to "the sovereign right of asylum," grants the accused the immunity; and the state where the offense was committed, no more suffers than if it were a case of a prior instead of a subsequent non-extraditable offense.

As we shall clearly establish further on in this brief, the extradited prisoner can only be prosecuted by authority of the *treaty;* without the treaty it would be impossible to prosecute him at all, crime being entirely local. The treaty, then, is the source and measure of the authority conferred; beyond that in a given case, the prosecuting state cannot go, unless it obtains the authority of a *new* extra-

dition. The point is that by the extradition, the asylum conferred is only relinquished *pro tanto*, and retained as against trial or prosecution on all other charges on prior or subsequent, extraditable or non-extraditable offenses, with the right to a new extradition for an extraditable offense committed subsequently to the first surrender. If this right of asylum is waived or lost by failure of the accused to avail himself of it in due time, after his acquittal or release, then he may be prosecuted upon any charge, prior or subsequent, and irrespective of the extradition proceeding, or of the treaty.

It is conceded on all sides that the second charge of perjury is not the offense for or on account of which the extradition was granted. It has a resemblance, at least some resemblance in some respects to the preceding charge; but of course, this does not establish identity. Even if the evidence were the same in both cases, this would not make the offenses the same.

> "We do not think," say the Supreme Court of the United States in the *Rauscher Case*, "the circumstance that the same evidence might be sufficient to convict for the minor offense which was produced before the committing magistrate to support the graver charge justifies this departure from the principles of the treaty."

The evidence on each of the two perjury charges is essentially and necessarily different. In one case the oath is alleged to be before a notary public in verification of a pleading. In the other it is alleged to be before the court on a trial of the extradition case. One charge is in denying a marriage with the plaintiff in a civil suit; the other charge is in

testifying as a witness on the trial of the extradition case, that a certain so-called marriage *ceremony* occurred with a woman other than the party who brought the civil suit, but not in testifying that this ceremony constituted a marriage, for his testimony was that the *ceremony* did not constitute a marriage. The matter has already been sufficiently explained in this brief. A decision or adjudication, however, in the extradition case that the accused did not *marry* the plaintiff in the civil suit would have resulted in his acquittal on the extradition charge, and would have been *res adjudicata* of the second charge of perjury. This point also has been sufficiently discussed and the authorities fully supporting it have been cited.

Says LAWRENCE:

> "The fact that a person is extradited only for the crime, that has been *prima facie* proved against him, shows that the treaty would be evaded if he was tried for another offense included in the extradition treaty, or even for one of the same character, provided it was not the identical case for which the proofs were adduced and to which they are applicable. The proceedings, indeed, on which the extradition is founded, have been assimilated to an indictment by a grand jury." (14 Albany Law Journal, p. 90.)

The second charge of perjury is not therefore covered by the extradition.

2. In the next place, as to the situation presented on the record brought up from the judgment of the United States Circuit Court, on the appeal. It exhibits all the facts already stated in respect to the extradition, and the subsequent prosecution to con-

viction and sentence on a charge entirely different from that on which the accused had been extradited; and that the extradition case has never been prosecuted to a trial to a final conclusion; further, that more than three years have now elapsed since the extradition surrender, and the accused is still imprisoned, upon the charge on which he was extradited. In short, all of the controlling and essential facts, already fully presented in this brief, appear in the record on the appeal, including the bill of exceptions, as well as in the record on the writ of error. There was no evidence offered in the case on appeal in support of the answer and return (Rec., 19), although the court gave the respondents ample notice of the need of such evidence (Rec., 21). Of course, in any event, what is alleged in the petition and not controverted in the return is considered admitted, to the extent that it is not controlled by the evidence. It is a

> "necessary and well settled rule that in a petition for a writ of *habeas corpus*, verified by the oath of the petitioner as required by U. S. Rev. Stat., §754, facts duly alleged may be taken as true, unless denied by the return or controlled by other evidence." (*Kohl* v. *Lehlback*, 160 U. S., 293.)

But at no time has there been the least dispute that the accused has been extradited on a specific charge of perjury and actually brought to trial and convicted upon another and altogether different charge of perjury, and this while the extradition case was pending and awaiting trial to a final conclusion, and while he was held under and by virtue of the supreme and exclusive authority of the extra-

dition jurisdiction. Nor is it disputed that the extradition case has never been given a trial to a final conclusion, although he was extradited in the month of October, 1905, and is still held in actual custody, upon the extradition warrant. These facts and all of them are conceded in the return as it appears in both the record on the writ of error and the record on the appeal.

And it is also conceded that the accused never waived, but on the contrary, always insisted upon the rights granted him by the *treaty*, by Section 5275 of the Revised Statutes of the United States and by international law. The return to the rule *nisi* in the United States Circuit Court, makes reference to a previous application for *habeas corpus* (Rec., 8), when the court held (the decision was not on the *merits*, and not *res adjudicata*) that the petitioner must first await the decision of the state court of appeal before making his application for the writ. (154 Fed. Rep., 980.) This he not only subsequently did, but as the record shows, (Rec., 5), he even went back to the State Supreme Court for *habeas corpus* on the new state of facts, and was denied relief. He then having at last complied with all the conditions imposed by the decision in 154 Fed. Rep., 980, again petitioned the United States Circuit Court, upon a complete showing in the petition, of all the facts, and clearly indicating that he had exhausted all the remedies provided by the state and without success; but the Circuit Court nevertheless held that his only relief lay in the Federal writ of error to the State Supreme Court (Rec., 19). As already fully established in this brief, the course pursued by the United

States Circuit Court was from its inception to the end, contrary to and in conflict with the well settled law upon the subject; and certainly operated to deny the appellant the equal protection of the law. It was the duty of the court to grant the writ of *habeas corpus* irrespective of whether any relief had or had not been sought in the state courts; it was enough that the case involving as it did an imprisonment in violation of the *treaty*, was therefore one of "urgency" within the exception to the general rule; and after compelling the appellant by its decision reported in 154 Fed. Rep., 980, to nevertheless exhaust all remedies furnished by the state and he having subsequently done so, without success, it was clearly then, if ever, the duty of the Circuit Court to grant him the writ of *habeas corpus* and discharge him from the imprisonment, regardless of whether a writ of error to the State Supreme Court was then being prosecuted. His discharge would have ended that proceeding. All these propositions have been fully presented and the authorities sustaining them have been cited in this brief and need not be repeated here. The consequence of the refusal of the United States Circuit Court to grant the writ of *habeas corpus* and discharge the appellant is that he still remains imprisoned in violation of the *treaty;* and it will be more than a year from its issuance before the writ of error can be heard. Such a remedy is plainly inadequate; and the Supreme Court of the United States evidently had this in view, when in the *Rauscher Case*, it was explicitly held that the prisoner was entitled to the writ of *habeas corpus* from the Circuit Court in the first instance, and citing *ex parte*

Royall as authority for this exception to the general rule, as it was there held that a person imprisoned in a case involving the foreign or treaty relations of the government with other nations, would be entitled to the writ of *habeas corpus* from the proper Federal Court without being required to first resort to the state courts for redress, and the case would be considered one of "urgency" within the *exceptions* to the general rule providing for recourse to the courts of the state; but we have in the earlier part of this brief fully discussed the point, and respectfully refer to what is there said, and to the authorities there cited.

The Circuit Court clearly erred in refusing to permit appellant to prove that the sheriff was never appointed by the United States to receive or hold the custody of the accused (Rec., 20); and also in refusing to receive proof in the same connection that without appellant's consent and against his will and without the consent of the United States and Great Britain, the State of California removed him from the custody of the agent of the United States, the Thomas Gibson mentioned in the warrant of extradition, and placed appellant in the custody of the sheriff of San Francisco by whom he has ever since been imprisoned. The proffered proof was clearly relevant and within the issues, and established the trespass committed by the state in taking appellant out of the custody and control of the extradition process and putting him in the local custody of the sheriff, in an effort to supersede and destroy the extradition jurisdiction. It also was competent for the appellant to show that he did not con-

sent to a transfer of jurisdiction over his person from the extradition case to the second perjury charge. This fact, however, elsewhere appears in the record. At page 21 of the record on the appeal will be found all the facts necessary to establish the point as to the substitution of the second perjury charge for the extradition case and the failure without excuse to bring the latter to trial within a reasonable time.

Says the *uncontradicted proof* in the record at page 21,

> "That the petitioner on the date set in January, 1906, for the further trial of said extradition case, insisted upon the trial thereof, but the State of California and the said Superior Court overruled his demand and held that he would not at that time be given a further trial of said extradition case, but must stand trial on said indictment of December 29th, 1905, to which ruling of said Superior Court he duly reserved his exception. That ever since then the petitioner has at all times demanded and insisted upon the trial of said extradition case, but on motion of the State of California the said Superior Court refused to give him a further trial thereof. That at all times the petitioner has objected to the postponement of the trial of said extradition case."

Further on, at the same page of the record is the following *uncontradicted proof*:

> "That said extradition case could have been brought to trial in said Superior Court in the month of *January, February or March*, 1906, and instead of said trial on said indictment of December 29th, 1905."

The further and other essential facts on the appeal appear in the petition for the writ of *habeas*

corpus, not controverted in the return nor controlled nor affected by the evidence. (*Kohl* v. *Lehlback*, 160 U. S., 293.) There was no evidence offered in support of the answer and return (Rec., 19).

VII.

FURTHER ARGUMENT ON MAIN PROPOSITIONS. FUNDAMENTAL PRINCIPLES OF THE LAW OF INTERNATIONAL EXTRADITION.

The argument now to be presented and the authorities we will cite to sustain it, are directed to the first four of the six following points urged by the appellant and plaintiff in error, to establish the errors assigned in the record, and those specified in this brief, on both the appeal and writ of error; and to establish his right to his discharge from imprisonment. The other two points have been sufficiently discussed in the earlier part of this brief, and the authorities sustaining our contentions in that behalf, are there cited; we know of none to the contrary. As stated, the argument now to be presented is addressed to the following four points and the authorities we will cite are in support of these points alone. The purpose is to furnish in this part of the brief, the law fully upholding and establishing the entire correctness of our position on all the propositions we have urged, with the exception of the two points stated; the latter are here omitted from the argument about to be made, because we think that what has been said in this brief on the matters to which they pertain, as well as the authorities already cited in that connection, sufficiently

cover the ground, and it would be impossible to do more than have recourse to unnecessary repetition.

1. First, we insist that by virtue of the *treaty*, the accused has the legal right to a trial to a final conclusion, of the extradition case; that this right is supreme, paramount and exclusive over all laws and all judicial or other process of the State of California, and imposes an obligation which the state must *first* obey and perform as of supreme and paramount authority, and to which all its laws and process and judicial power are necessarily inferior, subjective and subordinate. We further insist that it is manifestly incompatible with, and repugnant to both this right and obligation, and in manifest violation of the *treaty*, to arrest the accused, put him to trial and prosecute him on a charge of committing *another offense* subsequently to the extradition surrender, and do this while the extradition case is pending and awaiting trial to a final conclusion, and while the jurisdiction of the extradition continues supreme and exclusive over his person. There is nothing whatever in Article 3 of the convention of 1889, to authorize or sanction any such nullification of the supremacy of the extradition process and of the supremacy of the extradition jurisdiction in its exclusive authority and control *over the person of the accused.*

2. The extradition jurisdiction over the person of the accused, is special and limited; and extends no farther than the charge on which he has been extradited. It is a jurisdiction derived entirely from the *treaty;* and consequently is supreme and exclusive until it has wrought its function by se-

curing to the accused a trial to a final conclusion of the specific charge on which his extradition was granted, and he has been afforded reasonable time and opportunity after his final release on that charge, to return to the country of asylum. This is the scope of the *extradition jurisdiction* over the person of the accused, and it necessarily excludes all other jurisdiction over him, no matter what the source nor what the cause. The extradition jurisdiction is *sui generis*, and essentially different in its nature, extent and purpose from that which arises in the usual course of administering the local criminal law of the state,—an important point entirely ignored by the state courts and entirely ignored in the *dicta* of the Circuit Court expressive of its leaning in favor of the views announced by the State Supreme Court on the *habeas corpus*. This *dicta* came from Judge Van Fleet, the district judge holding the Circuit Court, who had recently been appointed to the Federal bench. Now the extradition jurisdiction has for its sole and only purpose the execution of the *treaty of extradition*. It is only by virtue of the treaty that the prosecution is possible. The treaty is both the source and measure of the authority for the prosecution;—and the only permissible prosecution against the accused is the one authorized by the *treaty*. It follows there can be no prosecution of the accused for a subsequent extraditable offense, except by special authority of a *new* extradition, where he has not put himself in default, and has not failed to avail himself of his right to return within the prescribed time, to the country of asylum. Until this supreme and paramount right

to return expires, he is absolutely protected by the *extradition jurisdiction* from all arrest, trial or detention upon any and every charge of committing a subsequent offense; and of course the nature of the offense can make no difference. Jurisdiction over the person of the accused is obtained by service of process, not by the act committed, the act constituting the crime charged against him. Until he is arrested and his person thereby made subject to the jurisdiction of the court, there can be no valid prosecution to trial and judgment. (*People* v. *Genet*, 59 N. Y., 81.) If his person is subject to the authority of another jurisdiction, and the latter, like the jurisdiction in extradition, is supreme over all the laws and judicial process of the state, it matters not what other crime is committed, the state cannot intervene nor intercept with another and different prosecution, for it cannot obtain the requisite jurisdiction over the person so long as the supreme law of the land holds jurisdiction of him for its supreme purpose. All this is self-evident. The wonder is that anyone would be found to dispute it. Let us see if there is a convenient analogy: The exclusive power and authority over matters of international extradition are vested alone in the national sovereignty of the United States, not only by express delegation in the Constitution, but by express prohibition in the same instrument against the several states exercising any similar power. Now, clearly if the United States District Court in a case within the exclusive criminal jurisdiction of the court, arrested the accused and while he was in its custody under and by virtue of its process, he com-

mitted murder within the jurisdiction of, let us say, the state of California, the latter could not invade the authority and power of the nation as represented in the process of the United States District Court and seize the prisoner and hold him on the charge of murder; but, on the contrary, must await the final termination of the Federal jurisdiction over him. Now, the international extradition jurisdiction is just as supreme over and just as exclusive of the power and authority of the state of California, as is the Federal jurisdiction in the case supposed. *The extradition jurisdiction is not the jurisdiction of the prosecuting state;* but is another jurisdiction and entirely derived exclusively from the *treaty,* though its purpose be in the concrete, to execute the international *treaty* by administering the criminal law of the state where the offense was committed, which in contemplation of the *treaty,* is the law of the United States. The situation is precisely the same as if the extradition had been for an offense against the national sovereignty of the *United States.*

Surely the state could not proceed and arrest the accused, for instance, on a charge of murder, while he was held in custody under the supreme authority of the warrant of extradition—for trial on the Federal charge. The *treaty* makes no distinction between extraditable crimes against the state and those against the United States. The treaty regards them all as crimes against the United States, for as to other countries, we are but one nation and one power. Of course if the extradition jurisdiction was merely the local jurisdiction of the pros-

ecuting state, the latter could elect whether to prosecute on one charge or another,—the *treaty* would have spent its force in merely serving to transfer the possession of the accused and would then have become *functus officio*, with no obligation resting on the receiving state to prosecute the accused on the extradition charge, and consequently no obligation to furnish him an opportunity to return to the country of asylum; nor would there be any reserved right of asylum to which he could have recourse. But such is not the nature of extradition nor of a treaty of extradition. It creates and establishes a jurisdiction *sui generis* over the person of the accused for the special and only purpose of bringing him to trial to a final conclusion on a specific charge of crime; and while in doing this it must resort to the local criminal law of the receiving state, it does not thereby *relinquish* the accused to the local criminal jurisdiction, but, on the contrary, retains to the fullest extent the supreme and exclusive authority of the international extradition over him for the very purpose of executing and enforcing the requirements of the *treaty* provision, those implied as well as those expressed, and of returning, or rather permitting, him to return to the country of asylum, detaining him no longer than reasonably necessary to give him a trial to a final conclusion on the specific charge upon which his extradition was granted, making his return thus dependent in point of time, on the result of the final trial, but returning him, that is, allowing him to return in any event either on his acquittal or after he serves his sentence, if he is convicted; but permitting no other jurisdiction on

any other charge, to interfere with the normal and consecutive course of the extradition process in the due and orderly execution of the *treaty*,—the supreme law of the land. This we trust will sufficiently explain the point we make as to the supreme and exclusive nature of the extradition jurisdiction, and that the latter will be understood as being a jurisdiction over the persons of the accused, essentially and altogether different from the local criminal jurisdiction of the receiving state, and persisting in its scope and in its supreme authority, throughout the entire course of the extradition case, and until the accused has either returned within the time prescribed, to the asylum and to the protection of the laws of the country of asylum, reserved to him as an essential condition of the extradition, or has voluntarily abandoned the right. While the extradition jurisdiction extends its authority over his person, it is necessarily supreme and exclusive. Therefore no other jurisdiction on any charge other than that specified in the extradition proceedings, is possible, until *after* the final termination of the extradition case, and after the accused has been given a reasonable time and opportunity to return to the country of asylum. If by reason of his committing another offense subsequently to the extradition surrender, he thereby *forfeits* his right to return (there is no law for such a proposition, it would be manifestly preposterous, if, because he violated a subordinate law, he forfeited the rights and protection conferred upon him by the *supreme law*), and the sovereignty of the asylum is deprived of its

prerogative and of its authority to determine whether the evidence adduced justifies *prima facie* the conclusion that he did commit such subsequent offense, and forfeit the right of asylum, yet nevertheless he cannot be arrested or put to trial on the subsequent charge while the extradition jurisdiction over his person continues to exist in full force and effect; *for in right of its supremacy it is exclusive.*

3. To conserve and enforce the fundamental and paramount right to a trial to a final conclusion of the extradition case, the law of the *treaty* prohibits the arrest or trial of the accused upon any other charge, until he is first given a reasonable time and opportunity after his final release from custody or imprisonment in the case where his extradition was granted, to return to the country of asylum. This principle also maintains in exclusive and supreme control of the person of the accused, the extradition jurisdiction, until the extradition case is ended. As against all trial and prosecution while the extradition case is pending, and on a charge of committing a subsequent extraditable offense, the well settled law on the point deems the accused to be present and actually resident within the territory of the nation granting the asylum; thus necessitating a *new* extradition to authorize the subsequent trial and prosecution on the subsequent extraditable offense. There is absolutely nothing in Article 3 of the convention of 1889, that can by any possibility be construed to the contrary. It simply fails to prohibit, *and it would be very ridiculous if it did prohibit*, the prosecution for the subsequent offense. It

certainly does not authorize a prosecution for a subsequent extraditable offense, without the necessity of a *new* extradition. It does not and could not deal with the subject of subsequent offenses; it is entirely foreign in its scope and purpose to all such matters. Above all else it does not permit a trial and prosecution for the subsequent offense, *while the extradition case is pending,* and while the extradition jurisdiction extends its supreme and exclusive authority over the person of the accused; the treaty would clearly be self-stultifying and self-contradictory if it did.

4. By Section 5275 of the Revised Statutes of the United States, the extradited prisoner is invested with the legal right to a trial to a final conclusion of the charge specified in the warrant of extradition. By the same statute every prosecution against him upon any other charge, which of course includes a charge of an extraditable offense alleged to have been committed subsequently to the extradition surrender, is prohibited until at least after his final discharge from custody or imprisonment in the extradition case. The statute no more than the *treaty,* nor than the well settled principle of international law, takes any distinction whatever, between such prosecutions for subsequent offenses and such prosecutions for prior offenses; nor is it possible for any such distinction to find support in reason or authority. It can make no difference at all and is entirely irrelevant to the point, that there exists an absolute immunity as to prosecutions for prior offenses, and none as to prosecutions for subsequent offenses; in the nature of things there could

be no such immunity as to the latter class of offenses but this is an entirely and essentially different proposition from saying they can be prosecuted while the previous extradition case is pending and awaiting trial to a final conclusion, with its supreme and exclusive jurisdiction over the person of the accused, and is also an entirely and essentially different proposition from saying that the subsequent extraditable offense can be put to trial and prosecuted, without the necessity of a *new* extradition, and to thus enable the sovereignty of the country of asylum to determine whether the evidence adduced is sufficient *prima facie* to justify the further modification and abridgment of the right of asylum as to the alleged subsequent offense;—an indispensable requirement for the protection of the "sovereign right of asylum" against invasion or impairment by prosecutions on fictitious or fraudulent charges or charges entirely unfounded. Any other doctrine would open wide the door to fraud and evasion, and leave both the accused and the country of asylum without remedy.

The *Federal statute* secures to the accused, the right to return to the country of asylum within a reasonable time after his final release in the extradition case, with no exception in favor of a prosecution on a charge of committing a subsequent extraditable offense. No such exception is possible without violating the exclusive authority granted the country of asylum by the *treaty*, to determine pursuant to the treaty, whether on the evidence adduced, the right of asylum shall or shall not be again withdrawn to the extent required for the prosecu-

tion of the subsequent offense; and no such exception is possible without also destroying the supreme and exclusive jurisdiction of the extradition, over the person of the accused, and making the *statute* self-contradictory and self-nullifying. The statute is by express provision of the Constitution, the supreme law of the land, and consequently excludes the application of all the laws and judicial process of the state of California, incompatible with its requirements. No one was ever more solicitous for the rights of the states than was Mr. Justice FIELD. In his opinion in *Taylor* v. *Taintor*, 16 Wall., 377, concurred in by Justices MILLER and CLIFFORD, he said:

> "The case is not essentially different from a surrender of a fugitive from justice under an extradition treaty. The United States have such treaties with several European nations, and whatever may have been the extravagant doctrines respecting the rights of the states, at one time in some parts of the country, it will not now be pretended that with the enforcement of such treaties any state, by her laws or judicial proceedings can interfere."

Section 5275 of the Revised Statutes of the United States was adopted for the sole and only purpose of carrying into effect, treaties of extradition made with foreign nations and in that behalf to specially safeguard and protect from infringement, *the rights of the accused*. Its proper construction therefore, requires that this purpose be constantly kept in view.

5. By the treaty, the statute, and the principle of international law, the extradited person is entitled as a matter of right to have his trial to a final con-

clusion, in the extradition case, *within a reasonable time.* What is a reasonable time will usually be determined by analogy to the *lex fori.* In California the period is sixty days and is held by the Supreme Court of the state to apply as much to a case where there has been a mistrial as it does to a case where no trial has taken place at all. (*Ex parte Begerow,* 133 Cal., 349.) Of course, this must be so, for the value of the right to a trial consists entirely in its being a trial to a final conclusion and *determination of the case;* especially is that true in an extradition case, where the fundamental right of the accused to return to the country of asylum depends for its enjoyment on the final termination of the case; and, consequently, any unreasonable and unnecessary postponemnt of the trial to a final conclusion is *pro tanto* an impairment and infringement of the right. If the state can postpone the trial to a final conclusion beyond the time reasonably necessary in a given case, it can postpone the trial indefinitely and perpetually, and thus deprive the accused absolutely of his right to return to the country of asylum and to the protection of its laws. Holding the accused in custody for years on the extradition charge, against his constant protest, without a trial to a final conclusion of the charge on which he was extradited, is extremely and oppressively unreasonable; and, in law, operates to terminate the jurisdiction over his person, and he is entitled to his discharge on *habeas corpus.* (*Ex parte Begerow,* 133 Cal., 349; *Hughes Crim. Law and Proc.,* Sec. 2567; *Rawley on Int. Extr.,* p. 12.) The value of the fundamental right of the accused to return to the country of asylum of necessity depends on the prosecution of the extra-

dition charge with due diligence to a final conclusion. These matters have all been fully discussed and the authorities sustaining them have been cited in the earlier part of this brief, addressed to a summary of the law pertaining to the case; and we respectfully refer in this connection to the argument and the authorities there presented in support of this important point.

6. The extradition warrant gives the sheriff of San Francisco no authority to imprison the appellant and plaintiff in error; nor has the sheriff been vested with any such power by the United States. So that, even if the warrant were now in full force and effect, the sheriff is not authorized by it to hold the custody of the accused. We have already in this brief sufficiently argued this proposition in the part addressed to the summary of the law pertaining to the various questions raised, and we respectfully refer to what is there presented in behalf of the point, repetition being unnecessary.

The argument and the authorities now to be presented will, therefore, be confined to the other four points first above stated (omitting the fifth and sixth as having been sufficiently presented),—the first branch of the argument being directed to the first three of these points, and the second branch being directed exclusively to the history and interpretation of Section 5275 of the Revised Statutes of the United States, constituting the basis of the fourth point; and there our task is done; in the earnest hope, however, that it then will have been adequately and commendably performed, in view of the dreadful and tremendous responsibility forced

upon the accused by the very grave and embarrassing necessity of defending himself against proceedings of an exceedingly destructive nature, though infamous and lawless.

In the first place, the right, the paramount and supreme right of an extradited person to a trial to a final conclusion of the charge specified in the extradition, the prohibition against his being prosecuted or tried on any other charge, and his right to "depart in peace" and return to the country of asylum at once on his acquittal or within a reasonable time after his final release in the extradition case, and free from all detention, interference, interruption or molestation, come from where it may, constitute the law of the *treaty* of 1842, generally known as the Ashburton Treaty. Therefore, the subsequent convention of 1889 does not and can not in these several particulars, afford us any additional law by way of repetition. So too, although not pertinent here, as already pointed out, but yet quite erroneously suggested by the state Supreme Court as being adverse to our contention, the provisions constituting Article 3 of the convention of 1889, prohibiting a trial of the accused for any offense committed *prior* to his extradition, is by implication of law, and was so held by the Supreme Court of the United States in the *Rauscher case*, 119 U. S., 407, also the law of the Ashburton Treaty of 1842; and, therefore, we insist, upon principle quite elementary, it is inoperative as a part of the convention of 1889. The expression of what the law implies is of no legal effect or significance, for it is a maxim of the law that *Expressio eorum quae tacite insunt nihil oper-*

ur. The point, we may say in passing, is an answer completely refuting the contention we have heard made, that the convention of 1889 works an implied repeal of Section 5275 of the Revised Statutes of the United States, and of the Ashburton Treaty. Aside from the answer suggested, all treaties are subject to all statutes passed to carry them into effect. No provision simply declaratory of the pre-existing law, and not a revision, is ever a repeal, even if it does not repeat the entire law; it is not to be construed an implied repeal of what it does not repeat, especially when the latter pertains to an entirely different matter.

> "So far," say the Supreme Court of the United States, "as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal." (*Fong Yue Ting* v. *United States*, 149 U. S., 721.)

Taking also the rule, as very clearly laid down and applied in *Johnson* v. *Browne*, 205 U. S., 309, there is no repeal of the statute. But we started out to say that even if Article 3 of the convention of 1889 were fully operative and effective, it could not and does not in any the least degree relate to any one of the four propositions we have above stated as being the subject of the argument at this time. The article referred to is an immunity clause against prosecutions for offenses committed *prior* to the extradition and is entirely silent on the subject of subsequent offences, which latter could not, in the very nature of things by any possibility come within the scope and purview of any such clause. The clause in

question is not a provision that subsequent extraditable offenses may be prosecuted or tried, without the necessity of a *new* extradition. And it is not a provision that a prosecution for a subsequent offense can be maintained while the extradition case is pending and awaiting trial to a final conclusion, and before the expiration of the right of the accused to return to the country of asylum. Such a complete and absolute abrogation of the law of the Ashburton Treaty, and of Section 5275 of the Revised Statutes of the United States, and of a fundamental principle of international law, and of the right of asylum, by the exceedingly doubtful and disfavored method of a repeal by implication, especially where there is no conflict, is simply preposterous. Nothing can in law be derived from a treaty of extradition by way of impliedly or constructively conferring a power to proceed and prosecute the accused on a charge of committing a subsequent offense, and especially while the preceding extradition case is pending and awaiting trial to a final conclusion. The *treaty*, the supreme law of the land, does not thus stultify nor contradict itself, and defeat the very jurisdiction it has created. In any event, the power in question, as to the prosecution of subsequent offenses, cannot be taken by implication. Professor Pomeroy, speaking of treaties of extradition, says:

> "Nothing is ever added by construction."
> (*Pomeroy on International Law*, § 199.)

Therefore, no authority to prosecute the person extradited, and to put him on trial, upon a charge of committing a subsequent extraditable offense, without the necessity of a *new* extradition, and also to

do this while the charge on which the accused was extradited is pending and awaiting trial to a final conclusion, can be derived by implication, especially when attempted on the basis of the altogether irrelevant provisions of Article 3 of the convention of 1889. This much by way of preliminary.

Treaties of extradition proceed primarily and fundamentally on the principle that the accused has secured and been granted by another nation in right of its sovereignty, the benefit, protection and enjoyment of the "right of asylum"; and that this sovereign privilege conferred upon him is to be maintained inviolate in all cases except where the *treaty* gives authority for its abridgment, modification or temporary withdrawal; and then only to the extent permitted by the sole and exclusive purpose of the particular extradition in a given case, to wit: That the accused be accorded in due course and with due diligence, a trial to a final conclusion, of the specific charge upon which he was extradited, to the exclusion of every trial or prosecution on any different charge; and that as against trial or prosecution on any and every different charge, he is in law deemed to still remain in the territory of the nation by virtue of whose sovereignty he is *guaranteed*, as a result of the extradition, the perpetuation of the asylum and of the protection of the right of asylum, providing that he himself does not voluntarily waive the benefit of the right by failing to return within the prescribed time, and thus voluntarily abandon the asylum reserved to him. It must be constantly borne in mind that the *treaty* secures to the sovereignty of the country of asylum the exclusive power

and authority to determine from the proofs adduced, and on specific application for extradition on a subsequent extraditable offense, whether the asylum granted shall be once more temporarily abridged, modified and withdrawn; but always and in every instance for a special and restricted purpose only, and no further; with the reservation in each case, where the extradition is granted, of the absolute right to the accused to reduce to actual possession, within the prescribed time, the asylum already held by him in right, which by fiction of law he occupies constructively as fully and completely as if personally resident and physically present on the soil of the sovereignty granting the asylum, and as against every trial and prosecution on a subsequent charge of committing a subsequent offense, extraditable in character. These propositions are strongly and amply supported by eminent publicists, and by judicial decisions of distinguished courts, including the Supreme Court of the United States. There is not a case in the books to the contrary, except the long ago overruled decisions of Judge Benedict and of such other but very few judges who have followed him, including, in a sense, some fugitive yet lingering expressions of Mr. Spear, predicated, no doubt, on the now exploded doctrine which in England controlled the position of the British Government in the cases of Burley and Caldwell, and subsequently formed the basis of the contention of the United States in both the Lawrence and Winslow cases,—a contention finally rejected as unsound and indefensible in principle, by the British Government, through Lord Derby in the Winslow controversy (2

Wharton's Dig. Int. Law, § 270, and pages 772, 766, 782), and by the Supreme Court of the United States in the *Rauscher case*, 119 U. S., 407, and previously by the United States District Court in *United States* v. *Watts*, 8 Sawyer, 370, as well as by the highest courts of Kentucky and Ohio in the Hawes case, and in the Vanderpool case, reported, respectively, the one in 13 Bush, 707, and the other in 39 Ohio St., 275. The views expressed by Lord Derby, strongly sustained by the argument of Lord Chancellor Cairns before the House of Lords in the Winslow case, are now conceded to be the law (1 Moore on Extradition, § 152), and are the views adopted by the Supreme Court of the United States in deciding the *Rauscher case*. They are the views upon which are predicated, in all essential particulars, the first three propositions for the maintenance of which we are contending in support of our claim that the imprisonment is in violation of the *treaty* and of international law. It is proper to pause here and state with emphasis that in England, in the Burley and Caldwell cases, and by the United States in the Lawrence and Winslow cases, it was held to be the law that a person extradited pursuant to the *treaty* could not be put to trial nor prosecuted upon any charge other than that on which his extradition was granted, *until the extradition case was first finally determined;* and that *then* he could be prosecuted on any charge, without affording him an opportunity to return to the country of asylum. This doctrine was finally rejected because it was too narrow,—not because it was not sound as far as it went in requiring that the extradition case be *first* given a

trial to a final conclusion before prosecuting the accused on any other charge, but that, on the other hand, it was erroneous and indefensible and went too far in permitting a prosecution and trial on any other charge when the extradition case was ended, by denying the right to return to the country of asylum. The whole subject will be found presented not only in Wharton's Digest of International Law, above cited, but in the volume of Foreign Relations of the United States for 1876, pages 204 to 307. The *Burley case* will also be found mentioned in detail in the opinion of the Court of Appeals of New York in *Adriance* v. *Lagrave*, 59 N. Y., 114, and in the volume of Foreign Relations of the United States just cited, pages 213, 214, 261, 262, 263, 276, 280, 284, 292, 294. The case of *Caldwell* will be found in the same volume, pages 265, 266, 276, 293. The case of *Lawrence*, and the adoption by the United States of the doctrine of the Burley and Caldwell cases, will be found at pages 229, 242 and 243 of that volume. So it will be seen that it always has been the doctrine of the United States that there can be no trial and no prosecution on a subsequent charge of committing another and different offense, *until after the final termination of the extradition case.* Since the Lawrence and Winslow cases the law of the United States has advanced and expanded,—not receded on the point; and it now prohibits a trial or prosecution of another and different charge, until *after* the accused is given a reasonable time and opportunity, subsequently to his final release in the extradition case, to return to the country of asylum and fails to avail himself of the right.

Spear, who wrote prior to the decision in the *Rauscher case,* evidently having in mind the rule referred to in the Burley, Caldwell and Lawrence cases, or one similar to it, says that *after* the extradition case is finally disposed of, the accused may then be prosecuted on a charge of committing a subsequent offense, without affording him an opportunity to return to the country of asylum. (Spear on Extradition, pp. 71, 107, 569.) He also contends that as to subsequent yet extraditable offenses the accused has no asylum reserved to him in the state granting his extradition. He recognizes the principle that:

> "For any other or different purpose than that for which the extradition is obtained, the right of asylum is not, by extradition, withdrawn from the extradited party at all."

But it is added:

> "He is, as to all other purposes, if committing no offense after his extradition, to be deemed still legally in the country from which he was extradited." (Spear on Extradition, pp. 84, 114.)

It is impossible to find the slightest support for the views stated by Mr. Spear respecting subsequent offenses and the denial of all asylum or right of asylum as to them, in any authority, ancient or modern; the authorities hereinafter cited are all to the contrary; and what he says on the point is absolutely inconsistent with his own statements of the law in various other parts of his treatise and especially with what he says as to the meaning and purpose of Section 5275 of the Revised Statutes of the United States. (See Spear on Extradition, pp. 73,

74, 80, 82, 83, 126, 205, 232, 233.) He first correctly declares there can be no prosecution or trial for the subsequent offense until *after* the final termination of the extradition case. (Spear on Extradition, pp. 71, 107, 569.) Then he says quite incorrectly and contrary to all the authorities that the commission of a subsequent offense deprives the accused of all right to return to the country of asylum; but no authority is cited and none can be cited to sustain any such a revolutionary proposition as that. He says that the right of asylum persists even after the extradition and as to all offenses except subsequent offenses, the accused is decreed to be still within the country from which he was extradited; but where does Spear get authority for the exception he specifies? He is the only writer who asserts such an exception. The authorities we cite further on in this brief are the other way. And how is the exception to be sustained? If the accused is in law deemed to be still within the territory of the country of asylum as to every charge but the one specified in the extradition, how can it be possible to make an exception of subsequent offenses? And why is he not entitled to the protection of the right of asylum against subsequent charges of subsequent offenses as he is confessedly against subsequent charges of prior offenses? Is there any greater reason for protecting him against one class of prosecutions than there is against the other? Is there not in a subsequent prosecution on a charge of committing a subsequent offense danger of fraud being perpetrated against the right of asylum and against the right to return to the country of asylum by resorting to the pretext and subterfuge of such subsequent pros-

ecution, to cut off the right of asylum? Can the sovereignty of the nation granting the asylum be deprived of the prerogative, the power and authority conferred on it by the *treaty*, in right of its sovereignty, to pass upon the evidence adduced, and determine whether there is *prima facie* proof sufficient to justify the withdrawal or abridgment of the right of asylum, upon the charge of committing the subsequent but extraditable offense? These are questions fully answered by the numerous authorities we will presently cite, directly opposed to the *ipse dixit* of Mr. Spear. It makes no difference what the subsequent charge or the subsequent prosecution, the accused is entitled to a reasonable time and opportunity after his final release on the extradition charge to return to the country of asylum, free from detention, interruption, interference or molestation; and as held by all the authorities on international law, in relation to the point, there can be no trial or prosecution on the charge of committing an offense subsequently to the extradition surrender, and of an extraditable character except upon a *new* extradition, unless, of course, the accused has failed to avail himself of his right to return to the country of asylum. In principle fundamental and authority numerous and harmonious, there is most emphatically an asylum and a right of asylum *reserved* to the extradited prisoner, against every charge and against every prosecution other than the one specified in the particular extradition proceedings; and the authorities all agree that the resulting prohibition against arresting, bringing him to trial or prosecuting him on any other or different charge, extraditable in character, is to be construed as respond-

ing to the fiction of law that as to every such charge the accused is deemed to be and remain in the country of asylum, thus necessitating a *new* extradition if he does not voluntarily waive his right to return to the asylum the law of the *treaty* has reserved for him, as a consequence of the extradition previously granted. Mr. Spear seems to be entirely oblivious of all this as being the well settled law; and does not appear to have ever read about it. The fact is undoubtedly that as in the instance of his very elaborate but futile effort to introduce into the law of interstate rendition the limitation as to trial in cases of international extradition (Spear on Extradition, pages 525 to 557), thereby overlooking the fact that the several states are not sovereign, and have no sovereign right of asylum, Mr. Spear was simply seeking and with far less plausibility to establish an erratic innovation in modification of "the right of asylum," and endeavoring to do so on no better basis than his bald, naked and exceedingly dogmatic assertion, entirely unsupported by reason or authority and in conflict with both. The doctrine expounded by Mr. Spear has a certain minor utility about it in enabling the prosecuting state to retain its hold on the accused after the final release in the extradition case, and proceed at once to prosecute him on the charge of committing a subsequent offense; and this probably appealed persuasively to Mr. Spear; but there is the danger ever present in such a case that the "right of asylum" the law of the *treaty* has reserved to the accused, may be designedly cut off and destroyed or at least impaired by a prosecution nothing more than a pretext and a subterfuge and having, as in our case,

no evidence whatever to sustain it. The doctrine in question, suggested by Spear, would certainly open wide the door to all kinds of fraud and evasion against the *treaty* and against the fundamental rights of the accused, especially his right to return to the country of asylum on his final release in the extradition case; and would deprive the sovereignty of the nation granting the right of asylum and reserving it to the accused against all charges but the one specified in the particular extradition proceedings, of the exclusive power and authority conferred by the *treaty* to determine from the evidence adduced whether on the subsequent charge of commit ting a subsequent offense, extraditable in character, the asylum reserved should be again modified and abridged. The right of the accused to return to the country of asylum is necessarily and inseparably consequent upon the "right of asylum" and becomes vested or absolute in every case on his final release upon the charge on which he was extradited. As well said by Judge Cooley:

> "He is in the state by compulsion upon a single accusation. He has the right to have this disposed of and then to depart in peace."

Mr. Spear's attempt to divorce the fundamental right to return or revert to the asylum *reserved*, from the right to a trial of the extradition case to a final conclusion, having nothing to sustain it but his *ipse dixit* and being contrary alike to both reason and authority, must necessarily fail. We notice he makes no suggestion that the exception he asserts can by any possibility be engrafted on Section 5275 of the Revised Statutes of the United States. In any event, the construction placed upon

that statute, since Mr. Spear invented his exception, by the decision in the *Rauscher case,* very effectually disposes of and removes his *ipse dixit* by means of which he sought to abolish the right of the accused to return to the country of asylum on his final release in the extradition case, in all instances where he is charged, just simply *charged* with committing a subsequent offense; that is what his position amounts to.

The extradition is never absolute; it is never merely a transfer of the accused, from one jurisdiction to another, to be dealt with by the receiving state *ad libitum,* and as fully and completely as if there had been no extradition at all, and no departure from the prosecuting state. It is invariably and necessarily a special transfer for a special and limited purpose with a reversion to the country of asylum when that purpose is ended. *It follows that the jurisdiction of the extradition is supreme and exclusive.* The extradition is both the source and the measure of the jurisdiction over the person of the accused, for the purpose of trial and prosecution on a criminal charge; beyond that the prosecuting state cannot go, without violating the *treaty.* Without the extradition there could be no trial or prosecution of the accused; with it, there can only be the trial and prosecution which it specially authorizes. No matter how much it may be a great convenience to the prosecuting state in the pursuit of vengeance, to discontinue and drop the extradition charge, substituting another and entirely different charge in its stead, the law of the *treaty,* the supreme law of the land, emphatically and absolutely forbids it. Treaties are not to be disregarded

simply because convenience or even an accommodating notion of substantial justice may seemingly demand it. To again quote Mr. Justice Story:

> "This court is bound to give effect to the stipulations of a treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions and requirements of the treaty or take away any qualification or integral part upon any notion of equity or general convenience or substantial justice." (*The Isabella*, 6 Wheat., 72.)

And in a recent case of international extradition it was forcibly said by the Supreme Court of the United States that while, of course, the escape of criminals is much to be deprecated, it is still of the utmost importance that the *treaty* obligations be kept in the highest good faith and that the custody of the accused acquired for one purpose and on one charge be not taken advantage of nor used by the receiving state, to prosecute him for another and different purpose and on another and different charge. (*Johnson* v. *Browne*, 205 U. S., 309.) In all things the state must proceed according to law; and if it comes to the question whether criminals should escape or the law be violated or perverted or overthrown in order to hold them, no self-respecting court or judge, recognizing a plain and manifest duty, will hesitate an instant to uphold and maintain the law and release the criminals. No crime can approach in atrocity the assaults made on organized government by overthrowing the law. We certainly cannot do better than to quote in this connection the eloquent argument of Lord Chancellor Cairns in the case of Winslow, before the House of Lords. He there said:

"The noble earl spoke the other night of those men as murderers, robbers and rogues, and for all I know they may be what he describes them to be, although the tenderness of our law assumes that a person is innocent until he is proved to be guilty. But be that as it may, I can conceive nothing more dangerous than to bring down a great and important principle to the level of the merits or demerits of the individual in whose case that principle is brought in question. That is not the way in which we act in this country with regard to our criminal law, on the great principles of which, and on the cardinal rules of evidence, we all depend for our lives and liberties. If in a particular case we were to overstrain or overthrow those great principles and those rules, the evil which we would have done would be sure to come back upon us in some great political prosecution, or some trial of a man against whom an unjust and violent prejudice happened to have arisen in the public mind. So it is with regard to this question of extradition. There are some words that fell on the subject from a great master of history, which are the words not only of a historian, but of a philosopher, and which I should like to read to your lordship. He says: 'We are ever too ready, when it is the redress of our own injuries that is in question, to strain and compromise those general laws to which we have all to look for protection in the time of our adversity; and thus, when the day of trial comes, we find those laws no longer in existence.'" (Foreign Rel., U. S., 1876, p. 296.)

We have made special reference to this feature of the case because in both the opinion of the state Supreme Court and in that of the federal district judge is the expression of a fear lest the criminal escape if the law were upheld. No such consideration should ever be permitted to influence the judi-

cial mind. There is a higher law based upon higher sentiments both of governmental polity and national sovereignty, giving just and paramount recognition to the *sovereign right of asylum;* and it is this law that all courts and judges must obey, instead of heeding the fears worthy of no better authority than the dignity of a policeman's functions.

VIII.

CITATION OF ADDITIONAL AUTHORITIES IN SUPPORT OF THE POINTS MADE.

We will now proceed in regular course to further present the numerous authorities fully sustaining our contention on all the points we have made in this brief in support of our claim that our imprisonment is in violation of the *treaty* and of international law. We will then next present the points and authorities in relation to the history and interpretation of Section 5275 of the Revised Statutes of the United States, which statute in and of itself amply sustains our position in all respects, and then we will conclude the brief as well as the argument, feeling assured that whatever else may be said, we have made both the brief and the argument sufficiently comprehensive and complete to include every conceivable phase of the points raised and of the questions presented.

Anciently, it seems, the sovereign doctrine of right of asylum was so highly and reverently esteemed that it was assigned to the special favor and protection of the national gods. *Heffter*, at page 146 of his work on International Law, tells us that

originally extradition was not permitted, "the fugitives invoking the protection of the national gods." And we know that at common law extradition was very strongly denied recognition. Mr. Lawrence, an eminent authority on international law, in the fourth volume of his commentaries on Wheaton's Les Elements Du Droit International, page 368, says:

> "The extradition by a country of its citizens and also of foreigners who are refugees therein, confident in the right of asylum, a right which is an inviolable attribute of all independent sovereignty, has no place in the common law, upon which the American and English have always relied for the protection of their persons, their liberty and their property."

And at page 371 he says:

> "Lord Coke pronounces himself energetically against extradition. He says: 'It is upheld and it has been decided that kingdoms divided under several kings, in league one with the other, are sanctuaries for the servants or subjects fleeing for their security from one kingdom into another and must not according to the laws and the liberties of kingdoms be delivered; and this is founded upon the law of Deuteronomy: *Non tractes domino suo servius, qui ad te confugerit.*'"

In an article written by Mr. Lawrence and published in 14 Albany Law Journal, page 88, he says:

> "We find in Lord Coke's Third Institute the strongest denunciation against the surrender of either citizens or strangers to foreign states to be punished according to their laws, with or without treaty. He instances no adjudged case, but cites some which show how strong in his time, both in England and on the continent, was the feeling that 'all kingdoms were free to

> fugitives, and that it was the duty of kings to defend every one of the liberties of their own kingdoms, and, therefore, to protect them.' 3 Institutes, 180."

The same sanctity of the right of asylum is maintained by international law. Says *Heffter:*

> "All independent states offer on their territory a natural asylum not only to their own subjects, but also to foreigners, as to the prosecutions coming from other nations against them." (Heffter, Droit International, par. Geffeken, p. 145.)

And Twiss says that treaties of extradition are *stricti juris,* "and in exception to the common law of nations." (Twiss on the Law of Nations, § 223.) It follows that the asylum granted is only abridged in extradition cases, to the limited extent of the particular charge specified in the warrant of extradition *and no further;* and that in all other respects this asylum remains and is reserved to the accused as a result of the extradition, and precisely as already explained, against every charge and every prosecution other than expressly authorized by the extradition process in the special case. In contemplation of law the extradited person still remains in the country of asylum and under the protection of its sovereignty, as against every charge and every prosecution not covered by the particular extradition; and this in law effectually prevents a trial and prosecution for an extraditable offense alleged to have been committed subsequently to the extradition surrender, except upon and by authority of a *new* extradition. The extradition is never a general relinquishing or surrender of the acquired asylum. It is at most but a temporary modification or abridg-

ment; and extends no further than the prosecution of the charge specified in the extradition proceedings. Therefore, a state cannot take advantage of the presence of the extradited person, and prosecute him on a charge *different* from that stated in the extradition process.

Lawrence quotes approvingly the following pertinent excerpt from the treatise of *Fiore* on International Law:

> "If after the extradition is obtained, a *new* crime is discovered, a *new* demand of extradition must be made and accorded before the person extradited can be prosecuted or punished for the *new* crime." (Lawrence's Com. sur Wheaton, Vol. 4, p. 507.)

In an article published in the Albany Law Journal, Vol. 16, page 363, Mr. Lawrence says:

> "When the extradition of an individual is granted by one nation to another, the protection of the foreign asylum to the accused party is only impaired to the extent expressed in the warrant, and that, for the cases not excepted or provided for in the convention, and for all other purposes, the person surrendered is to be deemed still legally in the country from which he was extradited; or, as stated in a recent treatise on extradition, 'the fiction according to which, for every fact foreign to the extradition, he is still in the territory of the country of refuge, must be completely respected; and if an offense is brought to notice in the course of the proceedings the results must be the same.' Vazelhas Etudes d'Extradition, page 155."

The articles of Mr. Lawrence in the Albany Law Journal are strongly approved by the Supreme Court of the United States in the *Rauscher Case.*

In the second volume of his work on extradition, page 1042, Professor Moore says:

> "In strict law every independent nation has the right to afford asylum to fugitive offenders and to refuse to deliver them up. This right it must be supposed to maintain except in so far as it sees fit to forego it. This it may do either in the exercise of comity or by placing itself under the obligation of a treaty. But, in whichever way it may be secured, the particular concession is not held to have the effect of a general abandonment of the right. Hence, if a nation agrees by treaty to extradite fugitives for certain offenses, it abridges its asylum only in respect to those offenses, and if, under its obligation to surrender, it delivers a fugitive up, it deprives him of asylum only as to the offense for which it is shown that his extradition is due, and surrenders him to be tried for that offense and for no other. As to other offenses, he is to be considered as being still within the state from which he was taken, and as being entitled to return to that state before being tried for any such offense."

That is to say, he must be again extradited pursuant to the terms and conditions of the *treaty*.

Lord Chancellor Cairns, in his argument before the House of Lords in the Winslow case, states the principle in the following terms, quoting from authority:

> "The extradition declares the offense which leads to it, and this offense alone ought to be inquired into. So that if during the prosecution for the crime which has led to the extradition there should arise the evidence of a new crime, a new demand of extradition ought to be made." (Foreign Rel. U. S., 1876, p. 287.)

Lord Derby expressed the same principle in very explicit language. He said:

"We contend that a person who has taken refuge in England, and has been surrendered after certain legal proceedings, for the purpose of being tried on a specific charge, *is only lent*, so to speak, to the government which claims him, for the purposes of that trial; and if, upon the charge so brought, he is not found guilty, then we say he is entitled to his freedom, and cannot be claimed again, except after a repetition of the preliminary inquiry which is necessary before extradition is granted, which, of course, implies that he must have an opportunity of returning to England." (Foreign Rel. U. S. 1876, p. 278.)

And he also said, replying to the contention of the United States, which is likewise the position taken by the California authorities as to the appellant and plaintiff in error, that the extradited person once in the possession of the prosecuting state, could be dealt with subject to no restraint except that which is imposed by its own laws,

"that this is contrary to the general spirit and intention of the treaty; contrary to what has always been understood as the practice; contrary, also, to the principles laid down both by the British Parliament and the American Congress. We contend that the government surrendering an accused person does so only after having satisfied itself by means of a judicial inquiry that there is a reasonable *prima facie* case which justifies the putting him on his trial; —just as no man can be tried here without first being committed by a magistrate, or, in some cases, without a true bill being found against him. It is also necessary that it should be shown to the satisfaction of the magistrate so committing the person for extradition that the offense of which he is charged is included among extradition offenses, and is not political in its character. Now, we say that both these safe-

guards are absolutely done away with if it is understood that a man extradited for one offense can be tried for another without a fresh extradition being made. A man is charged, say, with forgery. Extradition is granted. He is tried in America and acquitted." (We were not given a trial to a conclusion at all.) "It is clear that if all the facts which came out on the trial had been known to the committing magistrate he would not have been extradited at all on that charge. What right, then, has the state, which has only got hold of him as presumably guilty of that offense, to deal with him on another charge in a way that they could not have done if he had not been in the first instance unjustly accused? They are, in such a case as I have supposed—I use the phrase in a legal and not in a moral sense—taking advantage of their own wrong." (Foreign Rel. U. S., 1876, p. 279.)

Both Lawrence and Moore agree that the work of *Billot* on the law of extradition is a classic and a standard authority on the subject. They speak of it in very high terms (1 Moore on Extradition, Sec. 155, note). Now, Billot cites the authority of Faustin-Helie, Legravesend, Trebutien, Bertauld, Le Sellyer, Morin, Mangin, Foelix et Demangeat, Brouchoud, Ducrocq, Blondel, Bonafos, Kluit, Hefftter and Duverdy, saying:

"They all recognize that an extradited person cannot be tried for anything else but the infraction for which his extradition has been granted. Here is a rule established as firmly as possible. It is incontestable that the tribunals can try the accused only on the facts for which the extradition has been accorded. This rule is an immediate corollary from the principle which imposes on the judiciary power an obligation to apply the treaties of extradition, —a principle which itself is a direct conse-

quence of the higher principle of the separation of powers. The rule and the principle belong to the very organization of political societies *and must have precedence over every internal law* (italics ours). It is, besides, a condition *sine qua non* of the very principle of extradition." Billot Traite de L'Extradition, p. 308.)

And with great accuracy and precision he further says (page 313):

"The engagements taken by a government not to permit the extradited to be tried on any charge but the one on which his extradition was granted must be interpreted in this sense—that he shall be considered absent respecting all prosecutions for infractions not covered by the extradition."

How then can it be contended that subsequent offenses are an exception? They clearly are within the reason and purpose of the prohibition; then why should they be excepted?

No writer on international law has even intimated that any such an exception is possible; this alone should be and is conclusive against it. Is it supposable that if there existed any such exception it would not be mentioned by such eminent authorities as *Billot, Lawrence, Heffter* or *Fiore*, or by at least one of the many writers on international law? Or is it possible that if the exception ever existed that we would find the Institute of International Law, at its session in Oxford, formally adopting some twenty-six resolutions,—a sort of code on the law of extradition, and asserting the prohibition against prosecution on any but the extradition charge, without discovering that there was an exception in favor of prosecuting the accused on a charge of committing

an offense subsequently to the extradition surrender? On the contrary, we find the Institute adopting a resolution (No. 22) indicating very clearly the absence of the exception in question, especially when the resolution is read in its relation to another resolution immediately following (No. 23). The first resolution, Number 22, is in these words:

> "The government which has obtained an extradition for a determinate act is lawfully (*de plein droit*), except where there is a convention to the contrary, obliged not to permit the person so extradited to be tried or punished except for this act."

We have already seen that it is the law that the power to prosecute on a charge of committing a subsequent offense, cannot be taken by implication. If there was an exception to the rule stated in the twenty-second resolution of the Institute surely it would have been specified. However, the next resolution sets the matter at rest, and indicates very persuasively that no exception exists in favor of prosecutions on charges of subsequent offenses. The twenty-third resolution is as follows:

> "The government which has granted an extradition may thereafter consent that the person extradited be tried for acts other than the one which was the basis of his being sent back, provided that these acts can be the basis for extradition." (*Annuaire* V, p. 332.)

The evident purpose of this resolution is to dispense with the necessity of according the accused his right to return, but still securing and maintaining the exclusive prerogative of the country of asylum in right of its sovereignty to first determine whether any further or other prosecution shall be

permitted, and requiring the other charge to be of an offense extraditable in character. The proposition constituting resolution twenty-three could only be made effective by treaty stipulation, with proper provision affording the accused an opportunity to be heard. In a recent work on international law the action of the Institute, to which reference is above made, is cited, the author saying:

> "It must be emphasized that, according to *all* extradition treaties, it is a condition that the extradited individual shall be tried and punished for those crimes *exclusively* for which his extradition has been asked and granted" (italics ours). 1 Oppenheim on International Law, Sec. 332.

This, of course, is also adverse to any prosecution on any other charge, while the extradition case is pending and awaiting trial to a final conclusion. Indeed, there is not an authority in existence to sustain the action of the State of California in prosecuting the appellant and plaintiff in error upon a *different charge*, while the extradition case was pending and awaiting trial to a final conclusion, and while he was held by virtue of the supreme and exclusive jurisdiction of the extradition. It is a palpable case of using the extradition custody of the accused for a purpose not authorized by the *treaty*. This has always been considered to be fraudulent conduct. It is obtaining the custody on the faith of the obligation to first comply with the requirements of the treaty, and then taking advantage of the confidence reposed by the country of asylum, to use the custody acquired for a purpose entirely different from that prescribed by the *treaty*, and

which would not have been possible but for the extradition obtained by reason of the treaty. Say the Supreme Court of the United States:

> "The general scope of the two treaties makes manifest an intention to prevent a state from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then, having obtained possession of his person, to use it for another and different purpose." (*Johnson* v. *Browne*, 205 U. S., 309.)

Why this does not strongly apply to a trial and prosecution of the accused on a subsequent charge, while the extradition case is pending and awaiting trial to a final conclusion, to wit, a charge of committing an offense subsequently to the extradition surrender, is a question the state courts of California and the Federal district judge have not made the slightest attempt to answer. If the law is to yield to their expressed fears that the accused might escape if allowed the opportunity to avail himself of his legal right to return to the country of asylum, then manifestly the remedy is not in depriving the accused of his supreme right to a trial of the extradition case to a final conclusion, and invading the supremacy of the extradition jurisdiction, using his custody for a purpose different from that on the faith of which his extradition was obtained, but on the contrary why not concede him his right to a trial to a final conclusion, and within a reasonable time, on the charge upon which he was extradited, and to the exclusion of every different charge, and *then* having at least to that extent obeyed the law of the treaty, the supreme law of the land, they can in this way ameliorate their subsequent violation

of the law, in depriving the accused of his legal right to return to the country of asylum, and go ahead and prosecute him on the subsequent charge of committing a subsequent offense, and do this without incurring the least danger of the accused escaping from their clutches and destroying by his escape the foundations of the government, bringing anarchy and desolation to feast on the ruins, and, feasting, revel in chaos.

In any event the principle is still and must ever continue to be that under the *treaty* the accused can only, in the first instance, be prosecuted and put on trial upon the specific charge on which he has been extradited; in no other way can the obligations imposed by the treaty be fulfilled; and this of course excludes trial and prosecution on a charge of an alleged subsequent offense. *Heffter* very forcibly says:

> "The individual whose extradition has been granted cannot be prosecuted nor tried for any crime except that for which the extradition has been obtained. To act in any other way, and to cause him to be tried for other crimes, would be to violate the mutual principle of asylum and the silent clause contained by implication in every extradition." (Heffter Droit International, par Geffcken, p. 150.)

We cannot too strongly emphasize the point that this doctrine of international law has for its sole and only purpose the conserving and protection of the three fundamental rights, all derived from the treaty;—the right of asylum; the right in that behalf to a trial to a final conclusion of the extradition charge, and the right to return to the country of asylum on final release from custody or im-

prisonment on the charge specified and described in the extradition proceedings, by acquittal or otherwise; these rights re-enforced by the prohibition against a trial on any other charge manifest the solicitous care and indicate the strong safeguards with which the law has protected and does protect the *right of asylum* reserved to the accused by the *treaty* and by the federal statute. The value of the "right of asylum" consists entirely in its actual enjoyment; to unnecessarily deprive the accused of its benefit, when entitled on the termination of the extradition case, is to deny him the right itself. So, too, postponing unnecessarily or unlawfully the final disposition of the extradition case is depriving him *pro tanto* of the benefit of the right of asylum and of the benefit of his right to return to the country of asylum. Unlawfully postponing the enjoyment of a right is tantamount to a corresponding denial and deprivation of the right. *The law of the treaty and of Section 5275 of the Revised Statutes of the United States requires that the extradition case be prosecuted with due diligence to a final conclusion, and to the exclusion of every charge other than the one designated in the warrant of extradition.* The right to return to the asylum cannot be forfeited until it has actually *vested;* and besides this, there is no law declaring a forfeiture; we have no bills of attainder, nor *ex post facto* laws. We have already said, and repeat it, that it would be manifestly preposterous, if, because the accused violated a subordinate law, he forfeited the rights and protection conferred upon him by the supreme law. Says Spear, who, at least

in this particular, is fully sustained by both principle and authority:

> "It is to be remembered that each government assumes, as its starting point, in making an extradition treaty, that every person within its jurisdiction, and not violating its laws, is entitled, as against all the world, to the *prima facie* right of undisturbed and protected asylum. Now, neither government agrees to a withdrawal of this right in respect to any accused party, and neither agrees to place that party in the custody of the other, except upon specified conditions distinctly stated in the treaty, and for a purpose as distinctly stated in the proceedings required by the treaty; and hence it is simply monstrous to assume that these conditions and this purpose are operative only for securing the surrender, and absolutely of no effect the moment the surrender has been actually obtained." (Spear on Extradition, p. 205.)

The same writer quotes approvingly the following from *Wharton's Criminal Law, 7th Ed.*, Vol. 3, page 34:

> "The sole object of extradition is to secure the presence of the fugitive in the demanding state for the purpose of trying him for a specified crime. The process is not to be used for the purpose of subjecting him collaterally to a criminal prosecution other than that specified in the demand." (Spear on Extradition, p. 71.)

Lord Chancellor Cairns in his argument before the House of Lords in the Winslow case, after citing the authorities and quoting from them, says:

> "Now, my lords, I think these authorities, and they might be multiplied, will satisfy your lordships that, apart altogether from the wording of treaties there is a silent and implied condition in extradition that the crime for which

> the surrender of a man is asked must be specified, and that it is for that crime alone that he must be tried. I am absolutely unaware of any authority who has ever written the other way. * * * What is the object of specifying one offense, and being made the judge of the evidence with regard to it, if, after his trial for it, which may be a mere formality and result in an acquittal and show that he ought never to have been accused of that offense at all, he may be tried in the country to which he is surrendered for any other offense they may please to lay at his door?" (For. Rel. U. S., 1876, p. 289.)

And Lord Derby in a note to the representative of the United States says:

> "The true meaning of the treaty is that a person accused of a specified crime or crimes shall be delivered up to be tried for the crime or crimes of which he is accused, and an agreement between two powers that the right of asylum, equally valued by both, shall be withdrawn only in respect of certain specified offenses implies, as plainly as if it were expressed in distinct words, that in respect to the offense or offenses laid to his charge, and such offense or offenses only, is the right of asylum so withdrawn." (Foreign Rel. U. S., 1876, p. 259.)

And in an earlier note he says, with equal fidelity to the established principles of international law, pertaining to the subject:

> "Her Majesty's government believe that the only safeguard for the liberty of the individual and the maintenance of the right of asylum are to be found in the principle for which they contend, that the crime or crimes of which a man is accused in the country surrendering, which are proved against him there, and for which he is surrendered, are the only crimes for which he ought to be tried in the country claiming." (Foreign Rel. U. S., 1876, p. 227.)

It is now universally agreed that these views of Lord Chancellor Cairns and of Lord Derby correctly state the law. We present the following excerpts from the articles of Mr. Lawrence, published in the Albany Law Journal:

> "The essential principles of extradition, as presented by England, are that a person can be tried for no offense except the one for which he is surrendered. This is the proper construction of the treaty of 1842." (14 Albany Law Journal, p. 85.)
>
> "The fact that a person is extradited only for the crime that has been *prima facie* proved against him, shows that the treaty would be evaded if he was tried for another offense included in the extradition treaty, or even for one of the same character, provided it was not the identical case for which the proofs were adduced and to which they are applicable." (14 Albany Law Journal, p. 90.)

Again:

> "I have found no American treaty which provides in terms that the extradited individual shall not be tried for any offense for which he was not extradited. This may be owing to its being supposed to be provided for by the law of nations, as well as to the fact that a cession of one privilege does not carry with it universal jurisdiction, nor require that such jurisdiction be expressly negatived as to everything else." (14 Albany Law Journal, p. 93.)

At page 94 he approves Billot's statement of the law, which has been heretofore quoted in this brief. In a very learned and exhaustive treatise on extradition, of which Dr. Bernard is the author, it is said:

> "Mr. Billot is of the opinion that the judicial power must not proceed to try the extradited person, where a new crime is discovered since

> the extradition. This means it cannot be done except by opening negotiations, so as to obtain an extension of the extradition." (Bernard Traité de L'Extradition, Vol. 2, p. 516.)

With us, this can only be done by means of a new extradition. The same distinguished writer says:

> "The extradited person must not be tried on any charge but the one for the infraction which constitutes the object of the extradition. This principle is founded on the right of sovereignty of the country of asylum." (2 Bernard Traité de L'Extradition, p. 483. See, also, pp. 493, 510, 670.)

When he says that the principle confining the trial and prosecution to the extradition charge "is founded on the right of sovereignty of the country of asylum," the meaning is that it is this country which in right of its sovereignty has *reserved* to the accused, on his extradition, the asylum he previously acquired, with the implied guaranty in the treaty that he should be restored to that asylum, if he so elect, upon the final termination in his favor of the extradition charge, or on the serving of his sentence if convicted on that charge.

Judge Cooley in an article published in the Princeton Review, January, 1879, speaking of the legal *status* of the person extradited, says:

> "He is within the state by compulsion of law upon a single accusation. He has a right to have that disposed of, and then to depart in peace."

The same view of the law, in substantially the same terms, was expressed by the Supreme Court of the United States in *Cosgrove* v. *Winney*, 174 U. S., 64, 69. Now, the question is, can the state

interpose its subordinate and inferior authority by means of a criminal prosecution on a charge of committing a subsequent offense of an extraditable character, and thereby "check" or hold "in check" the prosecution of the extradition case or the supremacy and control of the extradition jurisdiction? We have already in this brief established the point that the extradition jurisdiction over the person of the accused is *supreme and exclusive*, and also discussed the meaning of the phrase "supreme law of the land," especially as to the effect on all the laws and judicial process of the state and we have quoted from Billot the declaration that the extradition jurisdiction and the extradition process take precedence over all municipal laws. This would certainly seem to fully answer the question, and it does; but we will also cite Lawrence on the point. He says:

> "The treaties are obligatory on the component states as well as upon the nation. They control the law, the power of the legislature and the power of the judiciary, in the sense that an interior law cannot hold in check a stipulation of a regular treaty." (Lawrence Com. sur Wheaton, Vol. 4, p. 503.)

On the principal question we have also the authority of Judge Gresham, who, while secretary of state, said:

> "With the idea of compulsory prosecution in view, it is laid down as a general rule, not merely that a person delivered up shall not be tried for an offense other than that for which he was surrendered, but that he shall not be so tried until he shall have had an opportunity to return to the jurisdiction of the surrendering government. This is the construction given by writers to the limitation as to trial, whether the

> limitation be expressed in terms thus comprehensive or in terms more brief." (Foreign Rel. U. S., 1895, p. 492.)

It would clearly be a fraud on the treaty and on the accused to extradite him, and then not prosecute him to a conclusion on the extradition charge; especially to imprison him for three years and more, without trial determinative of the case. The fraud is greatly intensified and aggravated by prosecuting him on another and different charge to final sentence for a term of fourteen years. It is the *equivalent* of securing possession of his person by false and fraudulent pretenses, with the ulterior design to use the extradition custody for an altogether different purpose than that represented, and for which, and upon the faith of which representation the country of asylum entrusted his possession to the demanding state. No such chicanery and fraud are sanctioned by international law, and it is a matter of no little surprise that any court could be found to endorse or sustain it. The accused, who has suffered in consequence, must be expected to vigorously and justly resent it rather than commend it. In contending against despotism, it is not reasonable to expect the victim to speak of it in respectful terms of conciliation; and we say that what the State of California has done in this case is, when measured by law, nothing else but *despotism;* and none the less so because its courts have upheld it.

There is one other text book we desire to cite. It is that of *Andrew's American Law,* an edition of this year (1908). It is there said:

> "The specific crime must be made to appear, for it is a rule that one extradited cannot be

> tried for any other crime than that charged in the extradition proceedings, at least until that crime has been prosecuted, and if an acquittal follows, the accused is given an opportunity to depart." (2 Andrew's American Law, § 910.)

In his Digest on International Law, Volume 2, page 798, Wharton says:

> "As a matter of international law, the defendant should only be tried for the offense for which he is extradited."

In Hawley on International Extradition, page 8, he says:

> "A fugitive who has been surrendered to the United States under an extradition treaty cannot be tried for other offenses than those named in the warrant of extradition."

The Parliament of Canada in 1889 declared it to be the principle of international extradition that:

> "This act shall not authorize the issue of a warrant of extradition of any person under the provisions of this statute, to any state or country in which, by the law in force in such state or country, such person may be tried after such extradition for any other offense than that for which he has been extradited, unless an assurance shall first have been given by the executive authority of such state or country that the person whose extradition has been claimed shall not be tried for any offense than that on account of which such extradition has been claimed."

This is Section 5 of the Act of 1889, and it is an official declaration by the highest authority in Canada of the principle of international law for which we are contending. Clarke, in a note at page 259

of the fourth edition of his work on Extradition, speaking of this Act of 1889, says that it is:

"a short but very well drawn act."

And at page 241 he says:

"In Canada the practice is regulated by the Act of 1886 (49 Vict. c., 142), supplemented by the Act of 1889 (52 Vict. c., 36)."

We have referred to the Act of 1889 simply for the purpose of showing that Canada has, through its Parliament, adopted the principle of international law laid down by the authorities we have cited, and has not made any exception in favor of a trial or prosecution on a subsequent charge of committing a subsequent offense.

IX.

FURTHER CITATION OF AUTHORITIES. REVIEW OF OPINION OF STATE SUPREME COURT. THE RAUSCHER CASE.

Having cited and quoted from treatises of recognized and distinguished authority, including the views of eminent jurists and publicists, fully sustaining our position and fully sustaining the points we raise, it is our purpose to now present the decided cases where the principles and doctrines on which we rely have been announced and followed as the basis of the court's judgment; incidentally we will compare and review the opinion delivered in our case by the Supreme Court of California, which proceeds on no principle or doctrine of international law, and rests upon no precedent, but is contrary to both principle and authority.—a proposition self-

evident when one stops and ascertains the conclusion at which the court arrived.

In the first place, and by way of preface, we desire to point out that the value of a judicial decision as a precedent, is in the *principle* of the law, which the court applied in determining the question or questions raised, and not in the parallelism of special and adventitious facts. Our system of jurisprudence is not built upon single instances in endless repetition, but on principles, rules and doctrines of the law. Says Lord Coke:

> "The law consists not in particular instances and precedents, but in the reason of the law, and *ubi eadem ratio idem jus;* for reason is the life of the law; nay, the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason." (Co. Litt., 97b.)

Now, what is the reason of the principle we invoke? Manifestly in order to conserve and maintain the "sovereign right of asylum," that the accused be secured his supreme right to a trial within a reasonable time, of the extradition charge, to the exclusion of any and every different charge, and this in protection of his right to return to the country of asylum, on his acquittal or other final release in the extradition case. In other words, the ultimate purpose is to secure to him the benefit and protection of the "sovereign right of asylum," which the *treaty* by necessary implication has reserved to him as a condition of his extradition against every charge and prosecution for an offense not within the particular extradition, thus necessitating as to subse-

quent offenses of an extraditable character, a *new* extradition, and thereby preserving and enforcing the sovereign prerogative of the country of asylum to determine from the evidence adduced whether the protection of the asylum reserved for the benefit of the accused, shall again be temporarily withdrawn and abridged for the purpose of a trial and prosecution on the subsequent charge of committing a subsequent offense. The exception contended for, in favor of prosecuting subsequent offenses or rather *charges* of commission of subsequent offenses extraditable in character, without a new extradition and to the exclusion of the then pending extradition case, is evolved and set up by the state of California in the most absolute subversion of the *treaty* and of the rights, obligations and the indispensable conditions which the treaty prescribed, and to which it gives rise. It is an exception that is simply impossible; its existence would be *destructive* of the supreme right of the accused to a trial to a final conclusion of the charge on which he was extradited; *destructive* of his supreme right to return to the country of asylum, on his acquittal or other final release on the termination of the extradition case, and to so return, without detention, interruption or molestation, come from what source it may, in other words, his right to have the extradition case disposed of and then "to depart in peace;" *destructive* of the sovereign prerogative of the country of asylum to determine from the evidence adduced whether the "right of asylum" should be again temporarily abridged and modified so as to authorize by a new extradition, the prosecution of

the accused on the charge of committing an extraditable offense, subsequently to the preceding extradition surrender; *destructive* of the implied prohibition of the treaty and of Section 5275 of the Revised Statutes of the United States against his being tried or prosecuted on a charge different from the one specified and described in the extradition proceedings; and finally, *destructive* of the right of asylum extended and reserved to him by the sovereignty of another nation, and only modified and abridged temporarily, for the purpose of criminal prosecution, to the special and limited extent of the specific charge designated in, and covered by the particular extradition. It is not therefore to be wondered that no publicist and no court have ever discovered nor suggested the existence of any such annihilating exception as that invoked and relied upon in our case by the state of California. So destructive is the exception set up by the state authorities, that it absolutely annihilates and wipes out completely the supremacy and indeed the very existence itself, of the extradition jurisdiction, and substitutes the local criminal jurisdiction of the prosecuting state as fully and extensively to all intents and purposes as if there had been no extradition at all. The doctrine asserted by the state authorities and those aiding and abetting them is precisely nothing but a gross exaggeration of the one now long since exploded, that when once a man is extradited and brought within the territory of the prosecuting state, the latter is entitled to deal with him, subject to no restraint except such as may be imposed by its own laws. This is the very same

doctrine, quite forcibly condemned and rejected as being palpably unsound and indefensible, by the Supreme Court of the United States in the *Rauscher case.* The court say:

> "It is unreasonable that the country of asylum should be expected to deliver up such person to be dealt with by the demanding government, without any limitations implied or otherwise, upon its prosecution of the party."

And speaking of the implied limitations derived from the *treaty,* the court further say:

> "It is therefore very clear that this treaty did not intend to depart in this respect from the recognized public law, which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty." (And of course for the one alone, on which his extradition was granted.) "If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offense is charged to have been committed, there is very little use for this particularity in charging a specific offense, requiring that offense to be one mentioned in the treaty as well as sufficient evidence of the party's guilt to put him upon trial for it. For can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the state which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offense, free from all the positive requirements and just implications of the treaty under which the transfer of his per-

son takes place? A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which the law governing that proceeding was intended to secure. If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them."

And after an exhaustive review of the authorities, with the purpose in view of ascertaining the true principles and doctrines of the law governing the question, and that, too, mark you, *in a case where pending the final termination of the extradition charge, the accused was prosecuted to conviction on a charge other and different from the one on which he was extradited* (that precisely being also our case), the Supreme Court of the United States, adhering to the principle declared by the authorities on international law, stated carefully and with great

precision, and as being without qualification or exception in favor of prosecutions for alleged subsequent offenses, the law of this country to be as follows, and made no attempt to limit it to "prior offenses;" for manifestly, if it applies to prior offenses, it must in reason and in common sense necessarily apply to subsequent offenses. It is the arrest and trial on the *different* charge, and the fact of a *different* prosecution than authorized by the extradition, that for reasons strongly applicable to subsequent offenses the principle prohibits;—and not that the trial on the different charge of committing a subsequent offense, and the different prosecution on such a charge, while the extradition case is pending, is any the less a prosecution *different* from the one specified in and the basis of the extradition than would be such a prosecution for a prior offense. The court then lay down the *principle*, in the following explicit terms:

> "Upon a review of these decisions of the federal and state courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."

This, it is manifest, is the very *principle* for which we are contending, and it recognizes to the full extent the well settled doctrines of international law, concerning the "sovereign right of asylum," the special and limited nature of the extradition as being simply a temporary abridgment of the asylum acquired; and the reservation or reversion in favor of the accused of the "sovereign right of asylum" as against all other charges and prosecutions not within the authority of the particular extradition, and therein his right "to return to the country from whose asylum he had been forcibly taken" under the extradition proceedings, when he is finally released from custody or imprisonment, on the charge upon which he was extradited. We repeat: It is the arrest and trial on the *different* charge, and the fact of a *different* prosecution than authorized by the extradition, that for reasons strongly applicable to subsequent offenses the principle prohibits;—and not that the trial on the different charge of committing a subsequent offense, and the different prosecution on such charge while the extradition case is pending, is any the less a prosecution *different* from the one specified in and the basis of the extradition than would be such a prosecution for a prior offense. As said also by the Supreme Court of the United States in a case of international extradition:

> "The general scope of the two treaties makes manifest an intention to prevent a state from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then, having obtained possession of his person, to use it for another and different purpose." (*Johnson* v. *Browne*, 205 U. S., 309.)

This clearly is just as much applicable to a prosecution of the accused on a subsequent charge of committing a subsequent offense as it is to a prosecution on a subsequent charge of committing a prior offense. In either case the prosecuting state having obtained the custody of an individual whose extradition was sought and obtained on one ground and for one expressed purpose, is using the specially entrusted and specially limited possession of his person "for another and different purpose" than the one authorized by the *treaty*. This is not keeping faith with the treaty; it is a fraud upon the treaty, and a fraudulent violation of the rights of the accused. Had we been first given a trial to a final conclusion of the extradition charge, and acquitted; and then within the prescribed time return to the country of asylum, there cannot be the least doubt that if our extradition had thereafter been sought on the second perjury charge, it would have been refused upon the ground that the evidence adduced was entirely and absolutely insufficient to make out a *prima facie* case. Now the treaty says that the country of asylum shall alone be the judge of this. The treaty is not so ridiculous and preposterous as to confer any such power on the prosecuting state;—the very state opposed to the asylum reserved, and whose interest would necessarily be adverse to conserving or protecting it. We must look to the *principle* which controlled the decision in the Rauscher case, for it is that alone which gives value to the case as a precedent in law. Says Chief Justice Marshall in *Carroll* v. *Carroll*, 16 How., 287:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be

> taken in connection with the case in which those expressions are used."

(The *case* in *United States* v. *Rauscher* is not that it involved a charge of a "prior offense," but that it was a prosecution for an offense *different* from the one upon which the extradition was granted; and so is our case.)

> "If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented. The reason of this maxim is obvious. The question actually before the court,"

(in the Rauscher case the question presented was precisely as in ours, whether pending the final termination of an extradition case, and while it was awaiting a trial to a final conclusion the accused, who had been extradited on a specific charge, could be arrested, placed on trial, prosecuted and convicted on another and different charge; and that is precisely our case also),

> "is investigated with care, and considered in its full extent; other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Surely no one will contend that the opinion of Mr. Justice Miller in the Rauscher case does not show an exceedingly learned and exhaustive investigation of the *principle* he laid down as being derived from and amply sustained by international law. It is the principle which fully and rightly responds to the broad question whether a prosecuting state having obtained the custody of an individual whose extradition was sought and obtained on one

ground and for one purpose, can lawfully use the entrusted possession of his person for another and different purpose than the one authorized by the *treaty*. We say that the very able opinion of Mr. Justice Miller fully and rightly responds to this broad question, dealing primarily, as in reason it must, with the feature presented of a *prosecution on a different charge,* while the extradition case was pending and awaiting trial to a final conclusion. This of course made quite immaterial the question whether the subsequent and different prosecution was for a prior or a subsequent offense, though in the actual application of the *principle* declared, to the special facts in the Rauscher case, reference was incidentally made to the adventitious and special circumstance there present of the prosecution being for a prior offense, with never a suggestion or intimation, however, that had it been for a subsequent offense it would have made any the least difference. The court made no attempt to revolutionize the *principle* of international law, by limiting it to the case of prior offenses. The court did, in what we have quoted, correctly state the principle, and as pointed out by Professor Moore, this statement of the principle is to be taken rather than that subjective portion of the court's opinion which speaks of a trial or prosecution on a charge of committing an offense previously to the extradition, which really is nothing more than the concrete application of the principle to the special facts of the case. (1 Moore on Extradition, Sec. 174.) The concluding portion of the court's opinion definitely settles this, and is quite as forcibly and obviously pertinent to a trial

and prosecution for an alleged *subsequent offense* as it is to a collateral prosecution for a prior offense; and the decisive and controlling point is that while the extradition case is pending and awaiting trial to a final conclusion *the jurisdiction over the person of the accused* is confined by the supreme law of the land to the specific charge on which he was extradited, and for that very conclusive reason it is impossible for any other jurisdiction on another and different charge to intervene or to interpose its claims. This reasoning of the Supreme Court of the United States is manifestly just as applicable to a subsequent prosecution on a charge of committing a subsequent offense as it is to a subsequent prosecution on a charge of committing a prior offense; in either case the requisite *jurisdiction* could not attach nor extend to the person of the accused while the extradition jurisdiction existed; and while the extradition case was pending and awaiting trial to a final conclusion. That this view is correct is made manifest by the following excerpt from the opinion of the court in the Rauscher case:

> "Under the views we have taken of the case the jurisdiction of the court to try such an offense" (one *different* from that on which he was extradited) "if the party himself was properly within its jurisdiction, is not denied; but the facts relied upon go to show that while the court did have jurisdiction to find the indictment, as well as of the questions involved in such indictment, *it did not have jurisdiction of the person at that time, so as to subject him to trial.*" (Italics ours.)

But why did the Supreme Court of the United States hold that there was no jurisdiction of the per-

son of the accused "at that time so as to subject him to trial"? Was it because the subsequent prosecution was for a "prior offense"? Manifestly and emphatically *no*. It was solely because the extradition case was pending, and awaiting trial to a final conclusion, and because the *extradition jurisdiction over the person of the accused*, was by virtue of the treaty and Section 5275 of the Revised Statutes of the United States *supreme and exclusive*, that the court held that no other jurisdiction could be acquired over the person of the accused on another and different charge; and this clearly is just as completely applicable to another and different charge based on the alleged commission of a *subsequent offense* as it is to one based upon the commission of a "prior offense."

As was well and expressively stated by the court in *People* v. *Stout*, 81 Hun, 341, a case of *habeas corpus* involving a matter of international extradition, in passing on the point:

> "By virtue of the supreme law of the land the custody of the relator was so qualified as not to exist other than for the purpose of his trial upon that specific charge" (the one stated in the extradition). "For any other purpose his person was beyond the legitimate control of the court, excluded from it by force of the international treaty before mentioned."

Now, mark you, this was not because the subsequent prosecution was for a "prior offense," but because the pendency of the extradition case, awaiting trial to a final conclusion, *excluded by reason of the supremacy of the pre-existing extradition jurisdiction*, all other jurisdiction over the person of the accused, and this necessarily whether on a subse-

quent or a prior offense. Surely no one will be ridiculous enough to contend that the prosecuting state can ignore the supremacy of the extradition jurisdiction, repudiate the obligations of the *treaty*, and seize and arrest the person of the accused, prosecute him to trial, conviction and sentence *on another and different charge*, and do this while the extradition case is pending and awaiting trial to a final conclusion.

Yet this is precisely what the State of California has done in our case, and its Supreme Court upheld the usurpation, very erroneously suggesting that the Rauscher case should be confined to the special and adventitious fact that there the subsequent prosecution was for a "prior offense," while here in our case the subsequent prosecution is for a subsequent offense: and further erroneously suggesting that in the Rauscher case there was "no occasion to define its precise extent," meaning the precise extent of the limitation as to prosecutions for other offenses. In other words, the state Supreme Court after it had expressly conceded that there were portions of the opinion in the Rauscher case favorable to the contention of the plaintiff in error, sought then to escape the authority of the case by resorting to the rather misleading or at least quite erroneous observation that there was no occasion in the Rauscher case for the court to define the "precise extent" of the law's limitation on the prosecution of the accused. There surely was occasion for the court to determine whether pending the extradition case and while it was awaiting trial to a final conclusion, and while Rauscher was

held by virtue of the supreme authority of the extradition jurisdiction, and on international process, to wit: the extradition warrant, he could be prosecuted to a conclusion, to trial and conviction on *another and different charge*, and whether the extradition jurisdiction, supreme and exclusive, operated as a matter of law to exclude the vesting of the requisite local jurisdiction over his person, essential to the subsequent trial and prosecution on the other charge.

There were both occasion and necessity for the Supreme Court of the United States to determine these questions in the Rauscher case, and the court in a very learned and exhaustive opinion, did determine them. Not only did the court determine these very questions, *but in carefully selected terms stated with much precision*, the scope and operation of the principle of the law controlling the decision; and did so in language in reason sufficiently and rightly broad and comprehensive to necessarily embrace every subsequent prosecution on any and every charge, whether of a prior or subsequent offense, while the extradition jurisdiction existed, and while the extradition case was pending and awaiting trial to a final conclusion. And pursuant to the principle controlling the decision, the court held that jurisdiction over the person of the accused, was confined to the extradition case and to the specific charge designated in the warrant of extradition; that in consequence there could be no jurisdiction acquired over him *on another and different charge*, but that on his final release from custody or imprisonment in the extradition case, he was entitled to a

reasonable time and opportunity to return to the country of asylum, "to depart in peace," free from all interference, interruption or detention. And this, as we have fully established in this brief, is the law upon both principle and authority. The Supreme Court of California entirely fails to grasp or even to inquire concerning the *principle of law* which controlled the decision in the Rauscher case, and holds as did some of the advocates of the old and now exploded doctrine that it is no concern of the country of asylum what becomes of the accused after he is extradited, nor whether he is prosecuted to a final conclusion upon the extradition charge, and to the exclusion of any other charge, nor whether his right to return to the country of asylum is or is not wrongfully or upon insufficient evidence taken away, impaired, or destroyed or unlawfully hindered and delayed; nor whether the sovereignty of the country of asylum is denied its prerogative to decide on the evidence adduced whether there is reasonable or probable cause to believe that the accused committed the alleged subsequent offense, extraditable in character, and should or should not be deprived of the protection of the "sovereign right of asylum" reserved to him by the *treaty*,—a question to be exclusively determined by the sovereignty of asylum, as the sole and only competent judge, and only possible of determination, as pointed out by Lord Derby, *on the return of the accused;* he is entitled not only to return on being finally released from custody or imprisonment in the extradition case, but also to a reasonable time and opportunity to do so; and his right cannot be

taken away, interrupted or obstructed by a subsequent prosecution on a subsequent charge, which may at best be nothing more than a false pretense or a mere pretext or subterfuge or entirely unfounded, and specially designed to destroy his right to return to the protection of the country of asylum. If, as in our case, he is convicted on the subsequent charge, without any evidence of guilt, and sentenced to a long term of imprisonment, his right to return, secured to him in the extradition case, will become absolutely worthless; it will be practically nullified. Surely no such destructive power as that is permitted by a *treaty* of extradition to the prosecuting state; on the contrary, such a power is repugnant to both the treaty and Section 5275 of the Revised Statutes of the United States. If the prosecuting state can take away or nullify the fundamental right of the accused to return to the country of asylum, it can take away and nullify the equally fundamental right to a trial to a final conclusion of the charge on which he was extradited; and it can abolish or nullify and obliterate absolutely the extradition jurisdiction; and if it can do these things, whether by means of a subsequent prosecution on a subsequent charge or by any other equally effective method, it can, because it does, practically nullify the *treaty*. This is what it signifies in the last analysis, and it is the logical extent of the annihilating power set up in our case by the State of California.

The Supreme Court of the state says in its opinion that the country of asylum "cannot be concerned in securing for him (the accused) immunity for new

crimes committed after his return to the demanding country." Nothing could be more specious and misleading. Of course, the country of asylum does not concern itself with the question of immunity; on the contrary, it is conceded that all such crimes if extraditable, as in our case, are open to prosecution; but to the end that such a prosecution will not interfere with the supreme and exclusive jurisdiction of the pre-existing extradition, over the person of the accused, on the specific charge upon which he was extradited, and, further, to the end that the subsequent prosecution will not be merely a false pretense or a mere pretext or subterfuge, or upon insufficient evidence, used to cut off, or impair or obstruct the reserved, supreme and "sovereign right of asylum" of the nation granting the pre-existing extradition, nor to cut off, impair or obstruct the equally supreme right of the accused to return to the country of asylum, on his acquittal of the charge on which he was extradited, no such subsequent prosecution on a charge of committing a subsequent offense can be maintained against him while the extradition case is pending and awaiting trial to a final conclusion, nor afterwards, except upon a *new* extradition where the alleged subsequent offense is extraditable in character, unless, of course, the accused voluntarily abandons the asylum reserved to him by failing to return to its protection within the prescribed time. *This is the law*, and it seems to have entirely escaped the attention of the Supreme Court of California

We would say to the Supreme Court of California, that the nation granting the extradition is most emphatically the nation most interested in maintaining

inviolate its own "sovereign right of asylum," the protection of which by the very act of extradition (limited as it is to a specific charge), it *reserves* to the accused, to be by him resumed on his final release from the charge on which he has been extradited; for this purpose and as an inseparable and essential condition of the extradition, it confers upon him the right to return to its protection.

Being the nation most vitally interested in maintaining its "right of asylum" and protecting the accused against the consequences of all violation of the right, it is its exclusive prerogative in right of its sovereignty to decide from the evidence adduced whether the asylum acquired by the accused and also *reserved* to him as an essential condition of the extradition, shall be again temporarily withdrawn, to authorize his prosecution on a charge of committing another extraditable offense, subsequently to the preceding extradition surrender. This protects against infringement interference or impairment by means of any arrest or detention on the subsequent charge of a subsequent offense, the fundamental right of the accused to return to the country of asylum, on his acquittal of the charge upon which he was extradited. And independently of all this, the country of asylum is interested in the due enforcement and the due execution of the *treaty*, and in that behalf, to the extent at least of the right to demand that the accused be given a trial to a final conclusion, of the specific charge on which his extradition was granted, and this to the exclusion of any and every other or different charge, and to insist that the prosecuting state, respect *the supremacy of the ex-*

tradition jurisdiction before proceeding to arrest and prosecute the accused on another charge; but whether the country of asylum has any interest in the matter or not, we would remind the Supreme Court of California that the *treaty* is the supreme law of the land and that the state and the United States are alike interested in complying with its requirements and conforming to its limitations. And we would repeat what the authorities cited in this brief fully establish, that a person extradited pursuant to a treaty, is entitled as of right to the asylum *reserved* for him and for his benefit by the nation granting the asylum; and consequently the Supreme Court of California is very much in error in asserting, as it does in our case, that forsooth a person *kidnapped* from the territory of a foreign country and brought into the United States cannot set up the lawlessness of his capture as against his prosecution on a criminal charge, that it follows in the case of a person *legally extradited pursuant to treaty* that there is no asylum reserved to him and to which he can be said to be entitled or to which he has the right to return; and from this very wrong and indefensible conclusion, the Supreme Court of California finds the transition very easy to the quite impossible deduction that the accused has no such thing as a right to return to the country of asylum.

Then, again, we note an entire failure on the part of the court to make or attempt any reply to the point that even were it competent to arrest and prosecute the accused on a subsequent charge of committing a subsequent offense, this certainly could not be done while the extradition case was pending

and awaiting trial to a final conclusion; and that the extradition jurisdiction over the person of the accused being derived from the *treaty*, the supreme law of the land, was therefore necessarily a jurisdiction supreme and exclusive, prohibiting while it existed any and every jurisdiction over his person on a subsequent charge of committing a subsequent offense. The court evidently supposed it successfully evaded the point by holding that "in the absence of any authority, compelling such conclusion, we are not prepared to hold that a person extradited under a treaty may, after his return, and pending his trial upon the extradition charge, commit any crime, however atrocious, with absolute security against prosecution until he shall have had an opportunity to return to the country from which he was taken."

While this is manifestly predicated upon a failure to understand the fundamental doctrine and principles of the law of international extradition, and is due to the evident want of acquaintance with the authorities on the subject generally, or the court would not have perceived anything startling or improper or impolitic in the doctrine, but would have seen that it was an essential condition of the extradition and necessary to the protection of the "sovereign right of asylum" *reserved* to the accused, against prosecutions without foundation, without evidence to sustain the charge, and prosecutions merely a pretext and subterfuge to cut off the protection of the "right of asylum" and of the right to return to the country of asylum, and prosecutions in fraud of the treaty, while, we say, all these matters so fully and exten-

sively already discussed in this brief, and the many authorities cited and quoted sustaining our position, would, if understood by the State Supreme Court, have revealed the necessity for the doctrine mentioned, to enable the nation granting the extradition and reserving to the accused the protection of its sovereign right of asylum, to maintain inviolate and against infringement or impairment this prerogative right in virtue of its sovereignty, by first passing on the evidence adduced and deciding therefrom whether a *prima facie* case existed on the subsequent charge of committing the subsequent offense, so as to require the further withdrawal or abridgement of the asylum reserved, if, we say, the State Supreme Court appreciated these fundamental principles and reasons of the law of international extradition, the court would not be seemingly taken by surprise in being confronted with a proposition it did not understand, and which it misrepresented by asserting that it gave immunity to crime.

But what we are at a loss to understand is why the court did not perceive that its decision went much further than to hold that the subsequent prosecution on the subsequent charge could be maintained without first affording the accused the "opportunity to return to the country from which he was taken," and went to the still greater extreme of holding that the subsequent arrest, trial and prosecution on the subsequent charge of committing a subsequent offense, could be maintained by the state, *while the extradition case was pending and awaiting trial to a final conclusion, and while the extradition jurisdiction, supreme and exclusive over the person of*

the accused, for the purpose of carrying out and executing the requirements of the treaty, still persisted and still continued in the full supremacy of its right and authority. The Supreme Court of the state never once adverted to this necessarily controlling phase of the case, unless, of course, it is the fact, not disclosed in express terms in the court's opinion, that having reached the conclusion that the right of asylum and the right of return to its protection, were both mythical, it would fall within the court's province to make the extradition jurisdiction and the extradition case, mythical also.

In any event, that is the practical effect of the decision. So, too, the Supreme Court of the state in citing and quoting Article 3 of the convention of 1889, could not and did not in the terms of that provision nor in the supposed negative provisions arising from the necessary omission of subsequent offense from its immunity clause, find the least permission for the arrest, trial and prosecution on charges of subsequent offenses, *while the extradition case was pending and awaiting trial to a final conclusion and while the extradition jurisdiction over the person of the accused, continued to be supreme and exclusive.* In this brief we have repeatedly pointed out that Article 2 of the convention of 1889 has no relevancy whatever to any of the questions presented in this case. Conceding that it does not extend its immunity to subsequent offenses, and, of course, it does not (it would be ridiculous if it did), the only deduction is that so far as this particular article is concerned, subsequent offenses can be prosecuted; but this does not mean that they can be

prosecuted while the extradition case is pending and awaiting trial to a final conclusion, and while the accused is held under the supreme and exclusive jurisdiction of the extradition for the purpose of executing the requirements of the *treaty*, the supreme law of the land; nor does it mean that subsequent offenses, extraditable in character, can be prosecuted without the necessity of a *new* extradition.

The article in question does not deal with these matters at all. It simply leaves them where in law they stood before Article 3 was adopted.

The State Supreme Court, in putting its perfectly untenable and absolutely indefensible and grossly illogical construction on Article 3, says:

> "By this provision the contracting governments reduced to an express and definite agreement the exemption which had been before implied. It seems clear that in limiting the exemption to crimes committed prior to extradition, the contracting parties indicated their intent that persons surrendered should not be exempt from prosecution for crimes subsequently committed. If under the former treaty there was any exemption for such subsequent crimes (which, as we have said, was not in our opinion the case), such exemption was removed by the new treaty."

Now the plain and the evident answer to all this is that no one ever supposed that "subsequent offenses" were within the immunity against prosecution, extended to prior offenses; and of course "subsequent offenses" are open to prosecution. Now that is as far as the State Supreme Court's construction of Article 3 can go; but it is manifestly a glaring *non sequitur* for the court to conclude from

this, that the prosecution of subsequent offenses can be maintained while the extradition case is pending and awaiting trial to a final conclusion and while the supreme and exclusive jurisdiction of the extradition continues over the person of the accused for the purpose of executing the requirements of the *treaty*,—the supreme law of the land. And it is equally a glaring *non sequitur* for the Supreme Court of the state to conclude that because you can prosecute subsequent offenses forsooth in that Article 3 does not grant immunity as to them, that you can maintain such a prosecution without a *new* extradition where they are of an extraditable character. The fact of the matter is that Article 3, besides being absolutely irrelevant to any of the questions presented, is but an expression of that which the law implies in any event, and hence is inoperative, the maxim being *expressio eorum quae tacite insunt nihil operatur*. Or, as Lord Coke says: "The expression of a clause which the law implies works nothing." (4 Rep., 73.) It is simply *clausula inutilis*. The person who deduces from Article 3 of the convention of 1889 any authority to prosecute subsequent offenses, or the authority to prosecute them while the extradition case is pending and awaiting trial to a final conclusion and while the supreme and while the exclusive jurisdiction of the extradition continues over the person of the accused, and thereby, according to such construction, makes the *treaty* stultify and nullify itself, or deduces authority to prosecute subsequent offenses extraditable in character, without the necessity of a new extradition, such a person reasons neither accurately, closely, carefully, nor logically, nor understands the law.

It follows that his conclusion or deductions must needs be wrong. In this brief we have already discussed the point that the record clearly shows that the extradition case has never been brought to trial to a final conclusion, and that on the contrary it has been *indefinitely* postponed over the objection and protest of the accused; also that the record shows the case could have been brought to trial within sixty days after the disagreement of the jury in December, 1905, and that since then repeated opportunity for its trial has existed, but against our objection a trial has been refused; now in face of these facts, the State Supreme Court says we did not offer

> "any evidence in support of the allegation that the trial on this charge has been unreasonably postponed against his objection and that the prosecution has no *bona fide* intention of putting him to trial on this indictment."

Yet in the very same opinion the court states them as facts in the case, when it says, as it does, that the extradition charge has not been brought to trial since the disagreement of the jury in the month of December, 1905, and that the district attorney proceeded to the trial of the second charge of perjury, against our objection. The record is clear and unequivocal, that at every step in the postponement of the trial of the extradition case, we most emphatically objected and protested against each and every continuance and against the substitution of the trial and prosecution of the second perjury charge; and further that we expressly based our objections and protest in each instance, upon the *treaty*, and upon Section 5275 of the Revised Statutes of the United States. Surely on the facts disclosed by the record

no one will have the temerity to contend that the extradition case has been brought to trial within the past three years to a final conclusion within a reasonable time or at all; nor that at any step in the various proceedings, we did not strenuously object and protest against each and every postponement of the trial of the extradition case, and against the arrest, trial, prosecution, conviction and sentence on the second perjury charge, and each time on the expressly stated ground that the same were and are in violation of the *treaty* and of Section 5275 of the Revised Statutes of the United States. And concluding our comment in review of the opinion and decision of the State Supreme Court, we desire to say the same are palpably at variance in all essentials with the well settled principles and doctrines of the law of international extradition, and with the many authorities referred to in the preceding pages of this brief,—a very self-evident proposition. The views announced by the court as the basis of its decision are an absolute abolition of the supreme and exclusive jurisdiction of the extradition over the person of the accused, and are therefore a nullification of both the *treaty* and Section 5275 of the Revised Statutes of the United States; and they are also an abolition of the "sovereign right of asylum," of the supreme right of the accused to return to the country of asylum on his acquittal or other final release on the extradition charge, and therein of his right to obtain such acquittal and release on that charge, of his supreme right to a trial to a final conclusion, and within a reasonable time of the charge on which he was extradited, and to the exclusion of

every different charge, of the law that the asylum he acquired is only abridged and modified and then temporarily to the special extent of the particular extradition and no further, and that as to every different charge or accusation other than the one upon which he has been extradited, the asylum is *reserved* to him, and he is deemed to be actually in the territory and upon the soil of the nation granting the extradition, and finally is an abolition of the supreme prerogative of that nation, held by it in right of its sovereignty and secured to it by the *treaty*, to determine from the evidence adduced, whether the asylum reserved to the accused shall be again temporarily withdrawn or abridged to the extent of the subsequent charge of committing a subsequent offense, extraditable in character, and this to the end that the "sovereign right of asylum" shall not be invaded or violated nor destroyed in the protection it guarantees the accused in every case of extradition, simply by a resort to a subsequent prosecution as a pretext or subterfuge, or without sufficient evidence, in deprivation of the right of the accused to return to the country of asylum and to the protection of its laws. This is an absolutely necessary power in the country of asylum to protect its "sovereign right of asylum," and to prevent fraud and evasion against the *treaty* pursuant to which the extradition was granted; and to that extent only was the acquired asylum withdrawn, being *reserved* to the accused in all other respects against any and every charge or prosecution not within the authority conferred by the particular extradition, and especially against his arrest, trial and prosecution on a subse-

quent charge of committing a subsequent offense of an extraditable character, thus necessitating a *new* extradition. On all these matters we have cited and quoted in this brief, many authorities fully sustaining the points we have made.

If, as held by all the authorities, it is the legal and necessary result of every extradition that there is *reserved* to the accused, the protection of the "sovereign right of asylum" of the nation granting his extradition, it must needs be that this nation shall alone possess competent power and authority to decide, and upon evidence adduced by the prosecuting state, whether this *reserved* asylum shall be modified or abridged upon the subsequent charge of the commission of a subsequent but extraditable offense; and this, of course, is only possible on a *new* extradition. The Supreme Court of California cites no authority to sustain its decision, nor is it possible to find any such authority, for it does not exist; and needless to say, could not exist without first abolishing the law itself, and repudiating the *treaty*. What we have said in review of the decision of the State Supreme Court will equally apply to the opinion of Judge Van Fleet, who simply gives his approval by way of *dicta* to what is stated in the opinion of the state court. We pass on to the presentation of additional authorities in decided cases, and which fully sustain the points we make.

X.

ADDITIONAL AUTHORITIES.

As distinguishing a case of extradition from one where the accused was unlawfully and violently smuggled into this country and then put on trial, the Supreme Court of the United States held that in the one case there was the protection of the "sovereign right of asylum," and in the other there was not; and speaking of the decision in the Rauscher case, said it was there held that

> "when a party is duly surrendered, by proper proceedings, under the treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed, both in regard to himself and in good faith to the country which had sent him here, was that he should be tried for no other offense than the one for which he was delivered under the extradition proceedings." *Ker* v. *Illinois*, 119 U. S., 442.

In a subsequent case, the court was confronted with a new attempt to evade the *treaty* and prosecute the accused on a charge upon which he had not been extradited, and this, while the extradition case was pending and awaiting trial to a final conclusion, —just as in our case.

The court, by the chief justice, say:

> "The treaty and statute secured to Cosgrove a reasonable time to return to the country from which he was surrendered, after his discharge from custody or imprisonment for or on account of the offense for which he had been extradited,

> and at the time of this arrest he had not been so discharged by reason of acquittal; or conviction and compliance with sentence; or the termination of the state prosecution in any way. *United States* v. *Rauscher*, 119 U. S., 407, 433."

Manifestly the principle here declared is precisely the one for which we are contending.

Further on, in its opinion, the court say:

> "The offenses, indeed, were different, and different penalties were attached to them. But it is immaterial that Cosgrove might have been liable to be prosecuted for both, as that is not the question here, which is whether he had had an opportunity to return to the country from which he had been taken. * * * We are of the opinion that under the circumstances Cosgrove retained the right to have the offense for which he was extradited disposed of and then to depart in peace, and that this arrest was in abuse of the high process under which he was originally brought into the United States, and cannot be sustained. (*Cosgrove* v. *Winney*, 174 U. S., 64, 68, 69.)"

If Cosgrove had or "retained the right to have the offense for which he was extradited disposed of and then to depart in peace," why not every person who is extradited pursuant to treaty? The right to a trial to a final conclusion and within a reasonable time, and to the exclusion of every different charge, is a right conferred by the *treaty* and by Section 5275 of the Revised Statutes, and they being the supreme law of the land, this right they establish is necessarily supreme and exclusive, and necessarily excludes every prosecution and trial on a charge of subsequently committing a subsequent offense, at least before the right to return expires.

In a case decided by the United States District Court for the District of California, and in an exceedingly able opinion by Judge Hoffman, a jurist of splendid attainments, the question is very elaborately discussed and the authorities cited. The views of Lord Derby in the Winslow case are set forth and shown beyond all doubt to be the law; so also is the proposition that if pending the trial and determination of the extradition case, "proofs are discovered of another crime, a new demand in extraditing must be made."

Judge HOFFMAN in the course of his opinion says with persuasive force:

> "The legislation of both Great Britain and the United States appears to have given a practical construction to the treaty in accordance with the views I am attempting to maintain. The British act of parliament of 1843, which was passed to carry into effect the treaty of the preceding year, provides (Sec. 3) that upon the certificate of a justice of the 'peace,' etc., 'it shall be lawful for one of her majesty's principal secretaries of state * * * by warrant under his hand and seal to order the person so committed, to be delivered to such person or persons as shall be authorized, in the name of the United States, to receive the person so committed and to convey such person to the territories of the United States *to be tried for the crime of which such person shall be so accused.*' The words, 'and for that cr[illegible] alone,' or 'for none other' are not, it is tru[illegible]ound in the act, but the motive and object of the surrender are so explicitly stated that the statute on every principle of fair and rational interpretation should be construed as if those or equivalent words had been inserted. The language of our own act of congress of 1848 is identical with that of the British act. It directs the person

> so committed to be delivered, etc., '*to be tried for the crime of which such person shall be so accused.*' The same language is used in the warrant under which the fugitive is surrendered. But if by a fair construction of the treaty the extradited person, after being tried for the offense of which he has been 'so accused,' may be tried for any other offense, neither the law nor the warrant express the whole object of the surrender. Will it be contended that any secretary of state would venture under the act to issue a warrant directing the surrender of the fugitive to be tried for the offense of which he has been accused, and after such trial, to be tried for any other offense which may be charged against him? To put this question is to answer it." (*United States* v. *Watts*, 8 Sawyer, 370.)

This certainly is a very conclusive view of the case, and it sustains to the full extent the position upon which we rely and is a very decisive argument against the proposition put forth by the State Supreme Court in its opinion.

Judge HOFFMAN further says:

> "The treaty is 'the supreme law of the land,' and as binding on the courts as a statutory enactment. If it contained an express prohibition the court would, beyond doubt, be deprived of jurisdiction. If by a just and reasonable interpretation the prohibition must be implied, the same result follows."

In a case before Judge DEADY in the United States District Court in Oregon, he said:

> "The treaty of 1842 is not only a contract between the governments of Great Britain and the United States, but by virtue of the Constitution of the latter (Article 6) it is also the supreme law of the land. It contains an explicit

> enumeration of the offenses for which persons may be extradited under it, and, by a necessary implication, the person surrendered under it is only allowed and held within the jurisdiction of the receiving government for the purpose of trial on the charge specified in the warrant of extradition. For the latter government to detain such person for trial on any other charge would be not only an infraction of the contract between the parties to the treaty, but also a violation of the supreme law of this land in a matter directly involving his personal rights." (*Ex parte Hibbs*, 26 Fed. Rep., 431.)

This very correctly indicates and defines the legal *status* of an extradited person when brought into the United States; and, of course, it must be the conclusion that the *status* cannot be impaired or modified or destroyed by any subsequent act on the part of the receiving state, whether it be in the nature of a trial or prosecution for an alleged subsequent offense or by any other method that the state may see fit to devise and pursue. In a case where there was no subsequent arrest for a "prior offense," but an arrest on a matter *post facto*, the extradition, and as a provisional remedy in a subsequent civil suit, Judge BROWN said:

> "The principle is that the proceeding under the treaty is for a limited and defined purpose only, *and that the exercise of jurisdiction over the prisoner for any other purpose than that mentioned in the treaty, until he has an opportunity to return, is a fraud upon the rights of the party extradited, and bad faith to the country which permitted the extradition.* (Italics ours.) * * * If the extradition proceeding and the presence and custody of the prisoner here are for the single named purpose only; and if the exercise of any other jurisdiction over

him, before he has a reasonable time to return, is a perversion of the treaty and the law, and a fraud upon the rights of the accused,—it is manifestly immaterial at what stage of the extradition proceedings, or in what place in the course of those proceedings, such a perversion or interference with the rights of the prisoner takes place." (*Ex parte Baruch*, 41 Fed. Rep., 472.)

In another case of similar character, and where the subsequent arrest was not for a "prior offense," but on and by authority of a provisional remedy in a civil suit entirely *post facto*, the extradition, the Supreme Court of New York, composed of judges of great and distinguished ability, held the subsequent arrest to be in violation of the treaty with France, and in the course of a learned and exhaustive opinion said:

"It may be properly assumed, in the disposition of it (the objection), that he was a fugitive from justice, residing in the French Republic, and only amenable to the laws of this state, by force of the extradition remedy provided for by the treaty. Without the provision made, he could not have been brought here from that country. And that provided it could be done only in a prescribed and particularly enumerated class of cases. The effect of such a specification, according to well settled principles of construction, is, to exclude the remedy from all but the enumerated cases. As to those not mentioned, the negative is as effectually implied, as though it had been expressly declared. For that reason, when the defendant was extradited, it was for the purpose of answering the crime mentioned in the proceedings taken against him, and for no other purpose whatsoever. *As to all other matters being beyond the reach of the laws of this state, he was absolutely*

entitled to his freedom. He was extradited for a single special purpose, that of being tried for the crime, for the commission of which he was removed from the protection of the laws of France. *Beyond that, he was entitled to the protection of those laws, so far as his personal liberty would have been secured by them, in case no removal of his person had been made.* (Subject, of course, to a new extradition.) In the language of the treaty, he was delivered 'up to justice' because he was accused of one of the crimes which it enumerated. And it was implied in his surrender, that he should be at liberty to return again to France, when the purposes of justice had been performed in the charge made against him. The nature of the treaty, as well as good faith with the foreign power entering into it, will permit of no other construction. That power consented, by the provisions made, to surrender the person, entitled in all other respects to its protection, for trial and punishment, on a particularly specified charge; and for no other end or object whatsoever. Without the provision made, he could not be extradited at all, and by that, it can only be done for a clearly defined object. And it therefore becomes the duty of the power, to which the surrender may be made, faithfully to secure its proper observance. For some purposes that has been expressly provided by the act of congress, requiring the president to take all necessary measures for the protection of the extradited person against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant, and until his final discharge from custody or imprisonment, for or on account of such crimes or offenses, and for a reasonable time thereafter.

"It is true that this provision does not, in terms, include the present case, for it only extends to acts of lawless violence, (it was subsequently held in the Rauscher case that the stat-

ute goes much farther and prohibits a trial on any charge other than the one specified in the extradition proceedings); but it is cogent evidence of the spirit of the obligation, resting upon the public authorities, to restrict the restraint imposed simply to the crime charged and mentioned in the treaty. *The obligation is no greater to protect the party from lawless violence, than it is to protect him from all other detentions of his person.*

"After the purposes of justice are satisfied as to the particular offense for which the party may be surrendered, then his right to return again to the protection of the laws he was deprived of for the single object allowed by the treaty, *is clear and absolute.* (Italics ours.) * * * If the power of detention and restraint is extended beyond them (the extradition charges), then there is no obvious limit to which it cannot be carried; and a person brought into the country, under the treaty for one purpose, *may be detained here indefinitely for an entirely different purpose.* (Italics ours.) No people are more interested in denying such a latitude of oppression than our own; for, otherwise, our citizens could be forcibly taken abroad upon one charge, and detained there, *on the abandonment of that upon others for which their extradition would never be consented to or allowed.* (Italics ours.) The principle in the case is an important one, and it necessarily grows out of the treaty stipulations made with other countries. They are part of the supreme law of the state, superior to those of its own enactment, by an express provision of the Constitution of the United States. And it is the duty of the courts to maintain its observance. * * * Certainly, no other principle than that securing immunity from arrest for causes not provided for by the treaty can either fairly or reasonably be deduced from its purposes and provisions." (*Bachrach* v. *Lagrave*, 1 Hun., 689, 692 to 695.)

This clearly is a very strong argument firmly founded on both principle and authority, and to a mind of logical trend, is surely very convincing. The Court of Appeals of New York, while commending the opinion in the case, yet reversed the judgment for reasons which have long since been overruled. Speaking of the opinion and judgment of the Supreme Court of New York in the case above quoted at much length, Judge HOFFMAN says in *United States* v. *Watts*, 8 Sawyer, 370:

> "This judgment was reversed by the Court of Appeals in 59 N. Y., 110—but not upon any claim that on the principles of international law or by the terms of the treaty, a prosecution for an offense other than the offense for which surrender has been made was permissible. On the contrary, the immunity claimed is pronounced eminently just in principle. The decision turned upon the supposed inability of the court to interfere."

There are two cases already referred to in an earlier part of this brief—one in Ohio and the other in Kentucky, both of which were the subject of diplomatic correspondence with Great Britain prior to the judicial disposition of them, the latter alone resulting in the discharge of the prisoners.

In the diplomatic correspondence the United States fell back upon its position as urged in the Winslow case, and the result was that the prisoners continued in custody until the courts taking the contrary and correct view of the law liberated them. In the case in Ohio, the court in a very able opinion, speaking through the chief justice, say:

> "The treaty secures to the person extradited exemption from trial for crimes and offenses

other than those specified in the warrant of extradition," citing with approval, *Com.* v. *Hawes*, 13 Bush, 700; *United States* v. *Watts*, 8 Sawyer, 370."

The court then refers to the right given by the *treaty* to the country of asylum to first pass upon the case, and says:

"This necessarily excludes the idea that the demanding government can decide for itself to try the prisoner, after obtaining custody, for other crimes; otherwise the purpose of the treaty is defeated. If the demanding government can so decide, the whole intention of the treaty could be defeated, *and the right of asylum, which has been the boast of both governments, would depend entirely on the action of the demanding government.* (Italics ours.) To extradite under the treaty for an offense named therein, and then to retain the prisoner for a non-extraditable offense, or for a different one, though extraditable, upon which no hearing had been had as provided in the treaty, would be, not only a breach of good faith by the demanding government, *but a violation of the right of asylum in favor of the accused guaranteed to him by the treaty. The sole object of the treaty was to enable each government to protect its citizens and inhabitants in the right of asylum, except they come within the provisions named.* (Italics ours.)

"The legislation of both governments clearly supports this construction. By the act of congress of 1841, United States Rev. Stats., Section 5272: 'It shall be lawful for the secretary of state, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized in the name and behalf of such foreign government, *to be tried for the crime of which such person shall be so accused.*'

"Again, by Section 5275: 'Whenever any person is delivered by a foreign government and brought into the United States and tried for any crime of which he is duly accused,' it is the duty of the president to take proper measures for his 'transportation and safe-keeping until the conclusion of his trial, for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment, *for or on account of such crimes or offenses, and for a reasonable time thereafter,* and may employ such portions of the land or naval force of the United States or of the militia thereof as may be necessary for the safe-keeping and protection of the accused.'

"In like manner, the British Parliament, in 1843, for the purpose of carrying into effect this treaty, enacted that the person to be extradited should be delivered to the person authorized by the United States to receive him 'to be tried for the crime of which such person shall be accused.' While legislative interpretations of statutes is not conclusive upon the courts, yet in the case of a treaty which is in its nature a contract between nations, enactments like these by the high contracting parties, are of persuasive power in the construction of the treaty. The right of the State of Ohio over the accused, who had sought an asylum in Canada, is derived from the provisions, express or implied, of the treaty of 1842. *In view of this treaty, the safeguards therein provided against the infringement of the right of asylum save in the specified cases* (italics ours), and the legislation by both governments to carry out those provisions, we think it clear that the court below did not err in refusing to put the accused on trial for a crime for which they were not extradited." (*State* v. *Vanderpool*, 39 Ohio St., 278, *et seq.*)

Yet, with this very decision before it, and other authorities of like import, the Supreme Court

of California files an opinion in our case, that there is no such thing as a right of asylum and no such thing as a right vested in or conferred upon the accused to return to the country of asylum on his final release in the extradition cases.

Take Judge Hoffman's very pertinent and very forcible suggestion in the *Watts case*, that the British Act of 1843 to enforce the *treaty* (and in Great Britain a treaty is of no effect until put into operation by an Act of Parliament), is rightly to be construed as if in terms express and positive, it said that the accused is to be delivered to the United States to be tried for the crime of which he shall be so accused, *and for no other*" (and this British Act of 1843 is part of the charter of our liberties, for pursuant to it we were extradited), is there any person so mentally obtuse, or perverted in intellect, as not to be able to perceive that this prohibits a trial of the accused on a subsequent charge of committing a subsequent offense, and requires as of first and highest obligation resting on the prosecuting state, that the accused be given a trial to a final conclusion and within a reasonable time, and to the exclusion of any and every different charge, of the specific charge on which his extradition was granted?

And is it not perfectly plain to any lawyer that such, too, is the meaning of Section 5275 of the Revised Statutes of the United States, almost in mandatory words, imparting the very idea? And how can there be any doubt about it when in the *Rauscher case*, and more recently in *Johnson* v. *Browne*, the Supreme Court of the United States has placed precisely that very construction on this stat-

ute and never for an instant entertained the very absurd notion that it was subject to any exception in favor of nullifying the treaty and nullifying the extradition on a specific charge, by shelving the extradition case and using the custody of the accused, and taking advantage of the possession of his person, especially entrusted on the faith of the extradition, to arrest, try, prosecute, convict and sentence him to fourteen years' imprisonment *on an entirely different charge.*

The effect of the British Act of 1843 in requiring a trial on the specific charge on which the extradition was granted, and prohibiting a trial on any other and different charge, prior or subsequent, will be found very clearly discussed in the exceedingly able argument of Lord Chancellor Cairns before the House of Lords in the Winslow case (Foreign Rel. U. S., 1876, pages 290, 291).

Again, we find the British Act of 1843 referred to in the same connection, by the highest court of Kentucky in a very well considered case,—the *Hawes case*, already frequently mentioned in this brief. The court, speaking of the British Act of 1843, say:

> "The precise purpose for which the fugitive is to be surrendered is set out in exact and apt language, and the act negatives by necessary implication the right here claimed, that the person surrendered may be tried for an offense *different* from that for which he was extradited. It is provided by the third section of the Act of Congress of 1848 that 'it shall be lawful for the secretary of state, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized in the name and on behalf of such for-

> eign government, to be tried for the crime of which such person shall be accused.' This, like the Act of Parliament, declares the purpose of the surrender to be, that the alleged offender may '*be tried for the crime of which such person shall be accused.*' The Act of Congress is, in one view, more important than the British Act of 1843. It does not rest alone on the proper interpretation of a particular treaty, and may be regarded as a legislative declaration of the American idea of the fundamental or underlying principle of the international practice of extradition."

Manifestly it would be sheer nonsense to say that the purpose of this principle thus forcibly stated by the court is merely to protect the accused against prosecution for a "prior offense," and that it is inoperative and meaningless against a prosecution on a charge of committing a subsequent offense, that the latter prosecution operates to destroy the principle and to destroy the right of the accused to a trial to a final conclusion of the charge on which his extradition was granted. We say "destroy" the right, because if the right exists, it is necessarily supreme, paramount and exclusive over all the laws, the process, the power, the authority, and the judicial proceedings and jurisdiction of the State of California; it is supreme and exclusive because the Constitution of the United States says that the law which has created and established the right, is the supreme law of the land. It follows and the only admissible conclusion is that there can be no jurisdiction acquired by the State of California over the person of the accused on a charge or a prosecution predicated upon the alleged commission of a subsequent offense, until *after* the final disposition of the

extradition case, and after the accused has been given a reasonable time and opportunity to return to the country of asylum.

In the *Hawes case*, the court further say:

> "The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil, depends upon the existence of treaty stipulations between them, and in all cases is derived from and is measured and restricted by the provisions, express and implied, of the treaty. The fugitive, Hawes, by becoming an inhabitant of the Dominion of Canada, secured the protection of British laws, and we could only demand his surrender in virtue of our treaty with that government, *and we held him in custody for the purposes contemplated by that treaty, and for none other.*" (Italics ours.)

The court cites and approves the statement of Lawrence in 14 Albany Law Journal, page 96, that

> "the state receiving the fugitive has no jurisdiction whatever over him except for the specified crime to which the testimony (in the extradition case) applies."

The court approves the excerpt from *Heffter*, and speaks of it as "this dominant principle of modern extradition," and says it is recognized by the British Act of 1843, and the Act of Congress of 1848 to the effect that the accused is surrendered *"to be tried for the crime of which such person shall be so accused."*

And then the court very expressively say:

> "Hawes placed himself under the guardianship of the British laws by becoming an inhabitant of Canada. We took him from the protection of those laws under a special agreement,

and for certain named and designated purposes. To continue him in custody after the accomplishment of those purposes, and with the object of *extending the criminal jurisdiction of our courts beyond the terms of the special agreement would be a plain violation of the faith of the transactions, and a manifest disregard of the conditions of the extradition.* (Italics ours.)

"He is not entitled to personal immunity in consequence of his flight. We may yet try him under each and all of the indictments for embezzlement, and for uttering forged paper, if he comes voluntarily within the jurisdiction of our laws, or if we can reach him through the extradition clause of the federal constitution or through the country of a foreign government. But we could not add to or enlarge the conditions and lawful consequences of his extradition, nor extend our special and limited right to hold him in custody to answer to the three charges of forgery, for the purpose of trying him for offenses other than those for which he was extradited. We conclude that the court below correctly refused to try Hawes for any of the offenses for which he stood indicted, except the three charges of forgery mentioned in the warrant of extradition, and that it properly discharged him from custody." (*Com.* v. *Hawes*, 13 Bush., 707.)

When the Hawes case came before Judge JACKSON, who presided in the trial court, he said:

"With me when there is a solemn duty staring me in the face, which would preclude a trial, although the party might be in the custody of the court, I would not disgrace my government or my country by the assumption of jurisdiction, when by such assumption the plighted faith of my government would be violated. *The prisoner cannot be tried for any offense for which he was not extradited;* and although he may be within the bar of the court or in a jail under the

> control of this court, as *this court is bound to regard the treaty, it is outside of its jurisdiction to proceed with the trial as 'the supreme law of the land' otherwise provides.''* (*Albany Law Journal*, Vol. 16, page 362.)

And Mr. Lawrence strongly endorses these views of Judge Jackson; they are rightly honored and respected in every court except the state courts of California.

In a case before the Texas court of Appeal, it is very clearly and impressively stated:

> ''In exact and unequivocal language the treaty sets out the precise purpose for which the fugitive is to be surrendered, and negatives by implication as strong and conclusive as a direct and positive negation that the person surrendered may be tried for an offense *different from that for which he was extradited under the stipulations of the contract made between the high contracting parties.''* (*Blandford* v. *State*, 10 Tex. App., 638.)

Follow this suggestion, and suppose the *treaty* contained an express, or, as the court puts it, ''a direct and positive negation,'' that the accused shall not be tried or prosecuted upon any charge other and different than that on which he has been extradited, until after his final release on the extradition charge and until he is thereafter first given a reasonable time and opportunity to return to the country of asylum, would any one be so ridiculous as to contend that in the face of this prohibition he could be put to trial and prosecuted on a subsequent charge of committing a subsequent offense and while the extradition case was pending and awaiting trial to a final conclusion? Not even the state courts of

California would be willing to ostensibly venture that far, and to that extreme in repudiating the treaty.

Yet the prohibition supposed is in the *treaty* as fully as if expressed in language of the most peremptory character.

And, as said by Judge HOFFMAN in the *Watts case*,

> "the treaty is 'the supreme law of the land,' and as binding on the courts as a statutory enactment. If it contained an express prohibition, the court would, beyond doubt, be deprived of jurisdiction. If by a just and reasonable interpretation the prohibition must be implied, the same result follows."

And he decided on a most thorough and exhaustive review of the authorities that the prohibition we have above instanced is the very prohibition contained in the treaty, by necessary implication of law, and as fully and effectively as if therein written in words positive and peremptory.

The Court of Appeals of Texas also said:

> "Our conclusion is, that the party extradited, must be tried, *if tried at all, alone upon the charge upon which he was extradited*, unless the judicial tribunals of this state have no right to take cognizance of, and give effect to treaty stipulations between our own and foreign governments." (The italics are ours.) *Blanchford* v. *State*, 10 Tex. App., 639.)

Again we direct attention to the point that it is the *principle of the law* to which we must look and not the special application of it to any particular case which may involve a special phase in addition to the general and ruling facts which render the *principle* applicable. All the authorities agree that a

different prosecution on a *different* charge than that specified in the particular extradition is the thing prohibited. The reasons, the policy and the very purpose of the *principle of law* on which this prohibition rests, make it as strongly applicable to a different prosecution on a different charge of committing a *subsequent* offense, as it is to a different prosecution on a different charge of committing a "prior offense." They are both of them *different* from the charge and prosecution specified in the particular extradition, and it is this alone that is prohibited, and it is this alone that calls for the prohibition. We have cited and relied upon the cases where the *principle* was applied to prosecutions on charges of "prior offenses," solely because they were *different* from the prosecution and the charge specified in the particular extradition, and not because of the fact of their being for "prior offenses," which intrinsically considered, could make no difference whatever. The reasoning adopted by the authorities, proves this to the certainty and conclusiveness of a demonstration. The distinction suggested and drawn by the Supreme Court of California, between offenses committed prior and those committed subsequently to the extradition surrender, in the application of the prohibition we invoke, is entirely *arbitrary,* and in all likelihood lies in the fallacy of taking the immunity applicable alone to "prior offenses" *against all prosecution,* an immunity recognized by Article 3 of the convention of 1889, and at that point, thence drifting into the manifest *non-sequitur* that forsooth there is no such immunity extended to subsequent

offenses (it would be absolutely ridiculous if there was any such immunity given subsequent offenses; it would be nothing short of insanity) that therefore the subsequent offense cannot only be prosecuted, but prosecuted without a *new* extradition, if it be extraditable in character, *and further still,* that it can be prosecuted, and the accused arrested, put on trial, convicted and sentenced, while the extradition case is pending and awaiting trial to a final conclusion, and consequently *while the extradition jurisdiction over his person, persists and continues in the amplitude and plenitude of its supreme and exclusive right and authority, by virtue of the treaty, the supreme law of the land.* It must be clear and conclusive that the opinion and decision of the Supreme Court of California proceed fundamentally on an entire misconception of the nature and scope of a very elementary *principle* of the law of international extradition, and are absolutely indefensible, because palpably and absolutely erroneous in every essential particular.

We are now prepared in the regular order indicated, to take up the history and meaning of Section 5275 of the Revised Statutes of the United States, which statute is alone sufficient to sustain our case, and entitle the appellant and plaintiff in error to his release from the imprisonment of which he complains, and to his restoration to his liberty upon *habeas corpus.*

The Supreme Court of California sweeps aside this statute with the remark, to us not at all intelligible, that

> "there is, in our opinion, nothing in the provisions of Section 5275 of the Revised Statutes

of the United States which conflicts with the views herein expressed."

This is all that the court says upon or about the statute, and it could just as well have said the same thing about the statute *de donis conditionalibus*, for all the meaning the remark conveys or imparts to the mind familiar with the law.

XI.

THE LAW OF SECTION 5275 OF THE REVISED STATUTES OF THE UNITED STATES.

If there is any meaning at all in Section 5275 of the Revised Statutes of the United States, it is not only in conflict with the views expressed by the Supreme Court of California, in our case, but it fully sustains our contention that the imprisonment of which we complain is unlawful. While the State Supreme Court takes occasion to give us an analysis, and a very imperfect as well as erroneous analysis of the opinion of the Supreme Court of the United States in the Rauscher case, there is nothing whatever said about the construction placed by the court and by Mr. Justice Gray in his concurring opinion upon the statute in question.

In the view of the State Supreme Court, the statute is as mythical as the extradition jurisdiction, and equally as mythical as it held to be the right of the accused to a trial to a final conclusion, and within a reasonable time, and to the exclusion of every different charge, of the specific charge on which his extradition was granted, and as mythical

as it held his right to return to the country of asylum on his final release in the extradition case.

To insure the due observance of and proper compliance with the requirements and obligations prescribed by *treaties of extradition*, in favor of the accused, Congress enacted, on March 3, 1869, the statute entitled:

> "An act further to provide for giving effect to treaty stipulations between this and foreign governments for the extradition of criminals." (15 Stat. at Large, 337.)

This statute was brought forward and is now Section 5275 of the Revised Statutes of the United States. The statute seems to have first come into discussion at the time of the Winslow controversy, when the government of the United States, through Mr. Fish, then secretary of state, said that the statute "does not affect or limit the rights of the two governments on the question."

2 Wharton's Dig. Int. Law, page 762.

The Attorney General took the same view (p. 797). Then the question came before Judge BENEDICT, and he said in disposing of it:

> "The Act of Congress of 1869 is a general law, intended for the protection of extradited offenders; but the protection it confers is expressly limited, to cases of 'lawless violence.' It is true it assumes as well it may, that the offender will be tried for the offense upon which his surrender is asked, but there are no words indicating that he is to be protected from trial for all other offenses. The absence of any provision indicating an intention to protect from prosecution for other offenses, in a statute having no other object than the protection of extradited offenders,

> is sufficient to deprive of all force the suggestion that the act of 1869, as a legislative act, gives to the treaty of 1842 the construction contended for by the accused." (*United States* v. *Lawrence*, 13 Blatchf., 301.)

The question came before the New York Court of Appeals and it was there held by the court in the course of the opinion rendered as follows:

> "Congress doubtless has power to pass an act similar to the English act referred to, as the whole subject of extradition is confided to the federal government. It has exercised this power by passing an act to protect fugitive criminals from lawless violence. (15 U. S. Stat. at Large, 337, § 1.) *That these provisions ought to be extended to protection from other prosecutions or detention, I do not doubt, but until this is done by the law-making power, by treaty or statute, we feel constrained to hold that the courts cannot interfere.*"

These were the views expressed by Church, C. J., on behalf of the court. The italics are ours.

Adriance v. *Lagrave*, 59 N. Y., 116.

In one of his very able articles in the Albany Law Journal, Mr. LAWRENCE strongly combats this view, and he says:

> "The act of 1869, for the protection of a person extradited under a treaty (Revised Statutes, § 5275), I consider, despite the opinion of the Court of Appeals in *Adriance* v. *Lagrave*, (59 N. Y.), sufficient to meet the case of a trial for an offense for which the prisoner was not surrendered." (Albany Law Journal, page 364.)

The Supreme Court of Ohio adopted the same view of the statute, in the Vanderpool case. Then

came the decision of the Supreme Court of the United States in the *Rauscher case*, 119 U. S., 407, and that decision set the question at rest, in terms that do not leave room for doubt nor controversy. Since then, the court has confirmed the construction it then placed on the statute, (*Cosgrove* v. *Winney*, 174 U. S., 64; *Johnson* v. *Browne*, 205 U. S., 309), and it is now well settled that the statute secures to the extradited prisoner, a trial to a final conclusion, *to the exclusion of every different charge*, of the specific charge on which his extradition was granted, and also secures to him the right to return to the country of asylum, upon his final release on the extradition charge or within a reasonable time thereafter. No exception can be read into the statute in favor of prosecutions or charges on alleged subsequent offenses. The statute makes no such exception, and the courts are powerless to interpolate an exception. It is not the province of the judiciary to enact laws, nor to abrogate confessedly valid legislation. For the reasons already given and discussed *in extenso* in this brief, the exception mentioned would be destructive of the most important and fundamental principles of the law of international extradition, and operate in practice to nullify the *treaty*, and all the essential requirements of the treaty, and open wide the door to fraud and evasion against the rights and obligations it prescribes. Instead of Section 5275 of the Revised Statutes, accomplishing its sole and only purpose of protecting the accused in the rights conferred upon him by the *treaty*, it would by means of the proposed exception, destroy those rights and kill the treaty. Not

only does the statute protect the accused against "lawless violence," but it protects him against any and every custody, detention or imprisonment of his person upon any and every different charge than the one specified in the extradition proceedings; and its phraseology is only intelligible upon the interpretation that he is entitled to a trial *to a final conclusion* of the charge on which he was extradited, to the end that he may as speedily as reasonable diligence in his prosecution, will permit, avail himself of his right to return to the protection of "the sovereign right of asylum," reserved to him by the nation granting his extradition. The statute, in other words, is an enactment of the proposition quite forcibly and very accurately expressed by Judge Cooley and repeatedly quoted in this brief, that the accused is in the state by compulsion upon a single accusation; "he is entitled to have this disposed of, and then to depart in peace." That surely does not mean that he can be arrested and detained on a subsequent charge of committing a subsequent offense,—a matter very fully discussed in the preceding pages of this brief, and our contention shown to be amply sustained on both principle and authority. We will now present the views of the Supreme Court of the United States, and of the authorities, supporting to the full extent, the construction of the statute, for which we are contending. In the first place, we make the point and urge it with emphasis, that whatever the meaning of the statute, its language and therefore its signification, applies indiscriminately and without distinction to both "prior offenses" and *subsequent offenses*. They are equally within the reason

and the purpose of the statute, and are certainly equally within the language of the enactment,—giving to the language a normal and logical interpretation. In the case of *Cosgrove* v. *Winney*, 174 U. S., 64, the court quotes the statute and following the interpretation given to it in the *Rauscher case*, holds that it prohibits the trial and prosecution of the accused on any and every charge other than the one specified in the particular extradition, and suggests no exception in favor of such a prosecution when based upon an alleged subsequent offense. And the court in concluding, uses almost the very language of Judge COOLEY, saying that:

> "Cosgrove retained the right to have the offense for which he was extradited disposed of and then to depart in peace, and that this arrest was in abuse of the high process under which he was originally brought into the United States, and cannot be sustained."

In the *Rauscher case* the court reviewed Sections 5272 and 5275 of the Revised Statutes, and then said:

> "The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party **shall not** be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, *he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought.*" (Italics ours.)

This language clearly excludes an arrest, trial

and prosecution on a subsequent charge of committing a subsequent offense. "He shall not," say the court, "be arrested or tried for any other offense." Surely a charge of committing an offense subsequently to the extradition surrender is a charge of committing *another offense;* therefore to arrest and try him on such other charge while the extradition case is pending and awaiting trial to a final conclusion, and before the expiration of his right to return to the country of asylum is clearly a violation of the statute.

Suppose he had been given a trial to a final conclusion of the extradition charge and was acquitted, and he then at once proceeded to return to the country of asylum, but was intercepted, arrested, detained, put to trial, convicted and sentenced to imprisonment for fourteen years on a subsequent charge of committing a subsequent offense while on trial in the extradition case. Would this be permitting him to "return *unmolested* to the country from which he was brought?" Manifestly *not.* Now, if such a subsequent arrest and prosecution would be a violation of the *statute* when occurring immediately after the acquittal of the accused, and before he had an opportunity to return to the country of asylum, then *a multo fortiori,* it would be a violation of the statute to arrest him on the subsequent charge, and prosecute him to conviction and sentence, while the extradition case was pending and awaiting trial to a final conclusion, and while the extradition jurisdiction over his person, persisted and continued in the full supremacy and exclusive control resulting from *its supreme power and authority, for the pur-*

pose of carrying out and executing the requirements of the treaty,—the supreme law of the land.

It is true, the statute as well as the decision in the Rauscher case, preceded the convention of 1889, but without going into further discussion of a point fully presented already, in this brief, there is no conflict, and no repeal of the statute by implication.

United States v. *Lee Yen Tai*, 185 U. S., 213.

Johnson v. *Browne*, 205 U. S., 309.

Say the court in the last cited case:

> "In addition to the provisions of the treaty of 1889, we find still in existence the already mentioned sections (5272 and 5275) of the Revised Statutes, which prohibit a person's arrest or trial for any other offense than that with which he was charged in the extradition proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought."

And replying to the point that Section 5275 of the Revised Statutes of the United States is by implication repealed by the convention of 1889, the court say:

> "These sections (referring to 5272 and 5275) are not incompatible with the treaty or in any way inconsistent therewith. We find nothing in the treaty which provides that a person shall be surrendered for one offense and then that he may be punished (prosecuted) for another."

And the court lay down the rule as to implied repeals in the following explicit terms:

> "Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication unless

the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty."

We have repeatedly pointed out that there is nothing in Article 3 of the convention of 1889 which can be construed to confer authority to prosecute so-called subsequent offenses, *while the extradition case is pending and awaiting trial to a final conclusion, or while the extradition jurisdiction over the person of the accused, persists and continues in full force and effect for the purpose of carrying out and executing the requirements of the treaty*, the supreme law of the land. Nor is there anything in Article 3 of the convention of 1889 which can be construed to confer authority to prosecute the accused on a subsequent charge of committing a subsequent offense, extraditable in character, without the necessity of a *new* extradition; and no one ever supposed that the treaty or the statute at any time were held or could be held to prohibit absolutely the prosecution of subsequent offenses, extraditable in character, or ever could be construed as extending to them, the immunity granted the accused against the prosecution of "prior offenses." This then most effectually disposes of the suggestion made by the Supreme Court of California, and of the point made by those acting for the state, that the convention of 1889, in Article 3, works an implied repeal of the statute and of the treaty of 1842, simply because there is nothing in the provisions of Article 2 prohibiting a prosecution of a subsequent charge of committing a subsequent offense, and there is such a prohibition in that article, against the prosecu-

tion of the accused on a charge of committing a "prior offense."

We trust we have made it sufficiently clear in this brief, that at most, Article 3 can only be construed as denying to the accused, on a prosecution for a subsequent offense, the immunity it grants him against prosecution for a "prior offense." The only consequence of this is that subsequent offenses, if extraditable, can be prosecuted; no one contended they could not. But they can only be prosecuted *after* the final disposition of the extradition case and *after* the accused has been given a reasonable time and opportunity to return to the country of asylum, after his final release on the charge upon which he was extradited. There is nothing in Article 3, nor in any other provision of the convention of 1889 which can by any possibility be construed to the contrary, or can rationally be claimed in conflict with or repugnant to these views. To hold, as does the State Supreme Court, that the subsequent prosecution is permissible and maintainable *while the extradition case is pending, is to make the treaty defeat and nullify the very jurisdiction it has created for the sole and special purpose of carrying out and executing its own requirements. It is thus made to stultify itself.*

The result is the same in construing the provisions or the absence of provision in Article 3, as authorizing not simply a prosecution of a charge of committing a "subsequent offense," but a prosecution without the necessity of a *new* extradition, where the alleged subsequent offense is extraditable in character, thereby cutting off the supreme and funda-

mental right to return, and destroying the protection of the "sovereign right of asylum," *reserved* to the accused, as inseparable to the extradition, and depriving the nation granting the extradition of the prerogative incidental to its sovereignty and guaranteed by the *treaty*, to first determine from the evidence adduced by the prosecuting state, whether the "right of asylum" should be again modified or abridged so as to authorize the trial and prosecution of the accused on the subsequent charge of committing the subsequent offense; and considering further that the accused is deemed in law to be actually resident and physically present within the territory of the nation granting the extradition, as to all prosecutions and charges not specified in the extradition proceedings,—a proposition also fully sustained by the many authorities cited and quoted in this brief, a prosecution against him on a subsequent charge of committing a subsequent and extraditable offense, without first obtaining for such prosecution *the authority of a new extradition, is an aggravated invasion of the asylum reserved to the accused.* It is inconceivable that the necessity for a *new* extradition can be dispensed with, unless the *treaty* contain some such provision as that which constitutes resolution No. 23 of the Institute of International Law, heretofore in this brief quoted in full.

It must also be remembered that no power to prosecute "subsequent offenses," while the extradition jurisdiction exists over the person of the accused; and no power to prosecute them when extraditable, without the necessity of first obtaining the authority of a *new* extradition, can be taken nor de-

rived by implication. (Pomeroy on International Law, § 199. Twiss on Law of Nations, § 223.)

We pass to the further citation of authorities in support of the construction we insist must in law be given to Section 5275 of the Revised Statutes of the United States. *Spear,* in his treatise on Extradition, discussing the meaning of the statute, very clearly, and, we think, conclusively, establishes the correctness of the position we urge. He says:

> "This statute (Rev. Stat. U. S., § 5275) originally enacted by congress in 1869, takes up the case at the point of the delivery of the fugitive criminal, and then provides in the president the authority for his transportation to this country, his safe-keeping and protection against lawless violence, until the terminus of the case in his discharge from custody or imprisonment for the crimes or offenses 'specified in the warrant of extradition,' and for a reasonable time thereafter. This 'warrant' was issued by the government that made the delivery; and the assumption of the statute is that it would state the crime or crimes, on the charge and proof of which the delivery was made, and, further, that the party being delivered would be tried *only* 'for the crimes or offenses specified in the warrant.'
>
> "Congress in enacting the law clearly had no idea of any other trial under the custody thus acquired, than that relating to the crimes designated in the extradition warrant. The law in its phraseology is constructed upon the theory that the custody is to be used for this single purpose, and not to be extended to a trial for offenses not charged nor proved in the proceedings, and not 'specified in the warrant of extradition.' The fact that the president is authorized to protect the fugitive against lawless violence *until the conclusion of his trial,* and until his discharge from custody or imprisonment,

and 'for a reasonable time thereafter,' shows that Congress regarded the case as a *special* one not falling into the ordinary category of persons arrested, tried and punished for crime. No such provision would have been made if the whole case, after the delivery, were simply one of municipal law, and had no relation to a custody granted by a foreign government under a treaty, and involved no obligation in respect to the use thereof. The theory of the legislation is that the United States, in obtaining the extradition of a fugitive criminal, *acquires no more power over his person than that which results from the treaty.*" (The italics are ours. (Spear on Extradition. pages 232, 233.)

In view of the principles and doctrines of international law upon the subject and as they are stated by the many authorities already cited and quoted in this brief, Mr. Spear probably intended to say with more accuracy, that the theory of the legislation is that the United States, in obtaining the extradition, can acquire no more power over the person of the accused than that which results from the *treaty.* In an earlier part of his treatise, he says in commenting upon Section 5275 of the Revised Statutes of the United States:

> "Nothing can be plainer than that Congress, when enacting this law, had no idea that the party delivered up to the United States would or could be tried for any other crimes than those 'specified in the warrant of extradition.' This is the only trial referred to in the statute; *it is the only trial of which Congress thought as following the extradition; and nothing can be more foreign to the clear implication of the language than the idea that the case admits of any other trial.* (Italics ours.) The understanding of Congress is distinctly indicated by the words

> used and not the less significantly because it incidentally appears. It is a well settled rule in the construction of statutes that when they affirmatively specify they exclude everything not specified. As to things not specified, 'the negative is implied as distinctly as if it were expressly declared.' "

(This is emphatically true as to subsequent prosecutions for subsequent offenses; besides this, it is well settled that the power to prosecute such offenses, while the extradition jurisdiction exists over the person of the accused; and the power to prosecute them where they are extraditable, without the necessity of first obtaining the authority of a *new* extradition, cannot be taken nor derived by implication. Pomeroy on International Law, § 199. Twiss on Law of Nations, § 223.)

> "This rule excludes any trial for crimes and offenses other than those 'specified in the warrant of extradition.' The supposition that the extradited party may be tried for any *other* offenses, within or without the list of extradition crimes, not the subject of the extradition, is utterly inconsistent with the language used by Congress." (Spear on Extradition, page 126.)

Surely this is very convincing as against the contention set up by the state authorities in our case, and fully supports the point we make that our imprisonment is in violation of the *statute* as well of the treaty.

In a very well considered case, before the Supreme Court of New York, the court say:

> "Before the supplemental treaty of 1889 was made, that of 1842 was in many cases so construed as not to permit the trial of a person delivered up in execution of the treaty, for any

offense other than that for which he was extradited *while his custody, taken by such surrender, continued.* (*Commonwealth* v. *Hawes,* 13 Bush., 697; 26 Am. Rep., 242; *State* v. *Vanderpool,* 39 Ohio St., 273; 48 Am. Rep., 431; *Ex parte Hibbs,* 26 Fed. Rep., 421, 431.) *And such is the import of the federal statute on the subject.*" (U. S. R. S., §§ 5272, 5275.) The italics are ours.

The foregoing excerpt is taken from the opinion of the court in the *habeas corpus* case of *People* v. *Stout,* 81 Hun. 339, where the prisoner having been extradited on one charge and convicted and sentenced on another, was discharged on *habeas corpus,* and this ruling was subsequently affirmed by the New York Court of Appeals.

In another case in the same state, the court had occasion to seek and ascertain the true meaning of the construction placed upon Section 5275 of the Revised Statutes of the United States, in the *Rauscher case,* and said:

"Much stress was laid in that decision, and very properly, upon the fact that, by the act of congress relating to extradition from foreign nations upon the application of the Federal Government, *it is expressly provided that the person surrendered shall not, when brought to this country, be tried for any other or different offense.* (Italics ours.) This is the construction given to the act in the case last cited. 119 U. S., p. 433; U. S. R. S., § 5275. The Act of Congress, passed in pursuance of the Federal Constitution, is the supreme law of the land, and this law protected Rauscher from trial for any other offense than the one upon which he was surrendered to this government by the British authorities. * * * It may be proper to add, also, that the Act of Congress regulating interstate extradition, does not provide that the fugi-

> tive surrendered *shall be exempt from trial upon any other charge, while that regulating international extradition does*, according to the construction given to it by the highest Federal court, as we have seen." (Italics ours.)

This is taken from the opinion of the court in *People* v. *Cross*, 135 N. Y., 540, 542.

In a case before the Supreme Court of Massachusetts, the court said that Section 5275 of the Revised Statutes of the United States implies that the accused is

> "to be tried *only for the specific offense for which he has been surrendered*, unless he voluntarily remains within the United States; and the modern practice of most foreign nations, and the opinions of the most recent text writers on international law tend to support this view of the *duty* (italics ours) imposed by a treaty of extradition, and of the rights acquired by the accused under it and the statutes, passed to carry such treaties into effect." *Commonwealth* v. *Wright*, 158 Mass., 154.

In a case in Georgia, afterwards affirmed in the Supreme Court of the United States, the highest court of that state say:

> "The limitation which exists in cases of foreign extradition is matter of express law. By the Act of Congress of March 3, 1869, c. 141, § 1, as construed in the Rauscher case, it is provided that the accused *shall be tried only for the crime specified in the warrant of extradition* (italics ours) and shall be allowed a reasonable time to depart out of the United States before he can be arrested or detained for another offense. It is significant that Congress while thus careful to secure to the fugitive the right of return in cases of extradition from a foreign country, has made no provision with reference to persons surren-

dered from one state of the Union to another." *Lascelles v. State*, 90 Ga., 363.

In his specially concurring opinion in the Rauscher case, Mr. Justice GRAY bases his judgment exclusively upon the statute, and his carefully prepared opinion fully sustains the contention we make in support of our claim that the imprisonment is unlawful. He said he concurred in the result,

> "upon the simple ground that by the Act of Congress of March 3, 1869, Chap. 141, Sec. 1 (embodied in § 5275 of the Revised Statutes), providing measures by which any person, delivered up by a foreign government for the purpose of being tried here for a crime of which he has been accused, may be secured against lawless violence 'until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter,' the political department of the government has clearly manifested its will, in the form of an express law (of which any person prosecuted in any court within the United States has the right to claim the protection), *that the accused shall be tried only for the crime specified in the warrant of extradition*, and shall be allowed a reasonable time to depart out of the United States, *before he can be arrested or detained for another offense.*" (The italics are ours.)

Nothing could be clearer nor more decisive; and the mind that can find in this very lucid interpretation and explanation of the statute, any the least countenance for the existence of the essentially arbitrary distinction taken by the State Supreme Court between prior and subsequent offenses, is indeed bereft of all the constituents necessary to form an

intelligent and a rational conclusion on any subject. The State Supreme Court makes no reference to the opinion of Mr. Justice Gray, but sweeps aside the statute and says it does not apply.

No one will impute to the very eminent jurist who wrote the specially concurring opinion in the Rauscher case, the ill-advised or reckless use of language; emphatically with him, "words are things, and those who use them improperly mislead themselves as well as others" (Per Black, C. J., in Hilltown Road Case, 18 Penn. St., 234); and his opinions all disclose the cautious and exceedingly appropriate selection of fitting and well measured words in expressing the conclusions of a mind eminently distinguished for great precision and profound learning. He had before him a statute to be first interpreted and construed to ascertain the intent of congress. The process involved no reference whatever to the special or adventitious facts in the Rauscher case, nor in any other case. The intent of congress was to be ascertained primarily from the language in which the enactment is expressed, as viewed in the light of the pre-existing principles and doctrines of international law. And the meaning which Mr. Justice Gray in the light of his great learning, and by the powerful logic of his mind, evolved from the terms of the statute is that the accused can *only* be brought to trial on the specific charge on which he was extradited, and when released upon *that* he is entitled to a reasonable time to depart out of the United States "*before he can be arrested or detained for another offense.*"

Now, mark you, not "for another offense," com-

mitted prior to his extradition, but for any other offense, irrespective of whether it be a prior or subsequent offense. It would be changing the statute entirely to insert in it any such distinction,—a distinction which we have shown in this brief, is contrary to all the authorities, and essentially arbitrary. And even if it were possible for such a distinction to be taken, and in reason and principle it is not, surely it could not be so construed and applied as to permit of the different prosecution on the subsequent charge of committing a subsequent offense, *while the extradition case is pending and waiting trial to a final conclusion, and while the extradition jurisdiction over the person of the accused persists and continues in its supreme and exclusive authority, for the purpose of carrying into effect and executing the requirements of the treaty,—the supreme law of the land.* Nor could any such distinction, if introduced into the statute, be construed to permit of the subsequent prosecution, without the necessity of a *new* extradition, where the alleged subsequent offense is extraditable. Nor could the requisite authority to prosecute the subsequent offense be taken nor derived by implication or construction. In addition to all this, such a distinction as that set up by the State Supreme Court is absolutely inconsistent with and repugnant to the plain and explicit language of the statute.

The requirement of a trial to a final conclusion of the extradition charge and the prohibition against any trial upon any other charge is specially designed to make available to the accused, and to protect from interference, interruption or postponement

his right to return to the country of asylum on his acquittal of the charge on which he was extradited; and is designed to secure this right to him in regular and consecutive order, free and untrammeled, at the earliest practicable moment; and this in first and primary obedience to the requirements of the *treaty* and of Section 5275 of the Revised Statutes of the United States,—the supreme law of the land.

The statute, its protection and the rights it confers, attach to the accused the moment he is brought within the United States, and necessarily *from that time* continue in full force and effect (to quote the language of the statute),

> "until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter."

The statute is the supreme law of the land; and the power and authority of the United States over the subject, are not only *exclusive* of the several states, but the latter are explicitly prohibited by the Constitution from interfering.

Now, in view of all this, how can it be said that the states have a shadow or vestige of power remaining, to seize the accused, put him on trial, convict and sentence him on a subsequent charge of committing a subsequent and extraditable offense, and do this, too, while he is under the protection of the federal statute, and having the rights which the statute confers upon him,—rights clearly pointed out and defined in the opinion of Mr. Justice Gray.

Does the law of the extradition prescribe the time when the accused can be prosecuted and put on trial on any other charge? If it does, and surely it would be more than passing strange if it did not, then being the supreme law of the land, no such prosecution can be maintained until the time so specified arrives. Now the law of the extradition provides that if the accused on being finally released on the charge upon which he has been extradited, does not within a reasonable time thereafter return to the protection of the country of asylum, he can legally be prosecuted on any offense, prior or subsequent; and that if he does return to the country of asylum within the prescribed time, he may then be prosecuted on a charge of committing an offense subsequently to the extradition surrender, but only on a *new* extradition pursuant to the terms and conditions of the *treaty*, if the subsequent offense is extraditable; otherwise he is entitled to the protection of the "sovereign right of asylum."

There is nothing whatever in all this, in the slightest degree inconsistent with the provisions of Article 3 of the convention of 1889. As already repeatedly pointed out in this brief, that provision in conferring immunity as to "prior offenses" only, is not a provision that subsequent offenses can be prosecuted *while the extradition case is pending and awaiting trial to a final conclusion*, thus making the treaty defeat the very jurisdiction it has specially created for the purpose of carying out and executing its requirements; nor is it a provision that subsequent offenses, extraditable in character, can be prosecuted without the necessity of a *new* extradi-

tion. And in no event can authority to prosecute subsequent offenses be taken or derived by implication nor by inference from the provisions of Article 3 of the convention of 1889. Both Article 3 and Section 5275 of the Revised Statutes must be construed together; the latter is sufficiently comprehensive to cover, and it does cover both prior and subsequent offenses. Any construction that would make them conflicting is entirely inadmissible as against the one that renders them consistent and harmonious not only with each other, but with the pre-existing and well established principles of international law. The contrary construction suggested and followed by the State Supreme Court proceeds fundamentally and primarily on a very strange confusion of thoughts and ideas of an essentially diverse nature; and this confusion arises, no doubt, from a want of familiarity with the principles and doctrines pertaining to the subject presented. As already repeatedly pointed out in this brief, it would not only be ridiculous but insane to include subsequent offenses in an immunity clause such as Article 3 of the Act of 1889. It is a provision, therefore, intrinsically entirely foreign to the question, and must be so regarded. It simply means that if the accused return to the country of asylum within the prescribed time, he cannot be prosecuted at all for any prior offense, since offenses of that class are then concluded by the particular extradition. On the other hand, the clause in question does not and in reason cannot include subsequent offenses, which, of course, are subject to prosecution in the manner prescribed by law. There is absolutely nothing in Article 3 of the convention of 1889 to the contrary.

The maxim—always, say the authorities, to be applied with caution,—*expressio unius est exclusio alterius,* cannot apply, as subsequent offenses do not come within the same category as prior offenses in respect to immunity from prosecution in the event the accused returns to the country of asylum within the prescribed time; for, if the subsequent offense is extraditable, it can be prosecuted on a *new* extradition; but the "prior offense" cannot. If the accused fails to return within the time limited to the country of asylum, he can lawfully be prosecuted on all offenses prior and subsequent, extraditable or not.

Aside from this, it must be continually borne in mind that even indulging the impossible assumption that Article 2 of the convention of 1889, does provide for the prosecution of subsequent offenses, and that this results by implication, and assuming still further that you can take such authority by implication, there surely is nothing even then in all this, permitting the prosecution of the subsequent offense, *while the extradition case is pending and awaiting trial to a final conclusion, and thus making the treaty frustrate and defeat itself;* nor is there anything to permit the prosecution without the necessity of a *new* extradition, when the alleged subsequent offense is extraditable in character. And to save the extradition jurisdiction from destruction, it would be perfectly proper and in accord with the established canons of construction to hold, if necessary, that Article 3 of the convention of 1889, in referring to offenses "committed prior to his extradition," instead as in the British extradition Act, "prior to his

surrender," means that every offense prior to the final termination of the extradition case, is included, as the *extradition* does not end until the case itself is finally disposed of, the "surrender" being but a step in the extradition. The difference in phraseology between Article 3 in the convention of 1889, and the British extradition act, amply justifies the construction suggested, were it necessary (and it is not) to preserve and maintain the integrity of the treaty and the supremacy of the extradition jurisdiction; such a construction would be especially appropriate in the case at bar, for reasons obvious and self-evident.

Now, as to the Federal statute. Of course, in the presence of the supreme law, the laws of the State of California, especially those relating to the acquisition of the necessary jurisdiction over the person of the accused in respect to the subsequent charge of committing a subsequent offense, and the authority of the state court to try him on the charge, are absolutely silent and inoperative; in law, are devoid of all force and effect.

The maxim is, *In præsentia majoris cessat potentia minoris.* It follows that the state court acquired no *jurisdiction* over the person of the accused on his trial, prosecution, conviction and sentence upon the second charge of perjury. Its proceedings on that charge are *coram non judice,* and in violation of both the treaty and Section 5275 of the Revised Statutes of the United States. The resulting imprisonment is unlawful for the same reasons. This conclusion is certainly incontrovertibly sustained by principle and authority as shown to a demonstration in this

brief. In the extradition case the imprisonment there has also been clearly and incontrovertibly established to be in violation of both the *treaty* and the Federal statute, first, because the accused was not brought to trial to a final conclusion upon the extradition charge, *within a reasonable time,* and in consequence, according to the authorities cited on the point, the indictment has become void; the jurisdiction over his person, under the warrant of extradition, has ceased and terminated, and he is entitled to his liberty; secondly, the warrant of extradition confers no authority on the sheriff of San Francisco to hold him in custody; the warrant does not run to the sheriff, and he has never been appointed by the United States to hold the custody.

All these propositions have been very elaborately discussed in this brief, and we are certainly warranted in saying that they are fully sustained by the many authorities we have cited and quoted. In conclusion, the imprisonment of the accused is, and according to all the authorities must be exclusively controlled by the *warrant of extradition.* The law governing the custody is as much a part of the warrant as if written therein in terms express and mandatory. Therefore the warrant must be construed precisely as if it read:

> "That the accused shall be held in custody for the sole and only purpose of giving him a trial to a final conclusion, and within a reasonable time, upon the specific charge herein designated and upon which his extradition is granted, and upon no other charge shall he be brought to trial or prosecuted until after he has first had a reasonable time and opportunity subsequently to his final release or trial upon said charge on

> which he is hereby extradited, to return to the country granting his extradition, and has failed so to do. And, provided further, that at no time prior to said expiration of his said right to return shall he be prosecuted, imprisoned nor placed on trial for or on account of any charge whatsoever other than the said charge in this warrant designated, and for which and upon which the said extradition has been granted."

There can be no dispute that the authorities we have cited and quoted fix these as the terms and conditions of the extradition; the warrant of extradition as thus construed correctly in response to the *treaty* and in conformity with the provisions of Section 5275 of the Revised Statutes of the United States, defines, limits and measures the jurisdiction over the person of the accused, and that jurisdiction is beyond question, *supreme and exclusive,* for it emanates from and is created by the supreme law of the land. It results that on both principle and authority our contention is right, that the imprisonment of the appellant and plaintiff in error, is in violation of the terms and conditions of the warrant of extradition, as above set forth, and in violation of the *treaty,* in violation of Section 5275 of the Revised Statutes of the United States, in violation of international law, and in violation of the Constitution of the United States in the particulars pointed out in this brief.

We respectfully present and urge the appropriate prayer in each case, for the *reversal* of each of the judgments, to wit: the judgment of the Supreme Court of the State of California, specified in the writ of error, and the judgment of the Circuit Court of

the United States, Ninth Judicial Circuit, Northern District of California, from which the appeal is taken. We respectfully request that suitable direction and instruction accompany the *reversal* of the judgments, and requiring the discharge of the appellant and plaintiff in error from imprisonment, *and restoring him to his liberty.* All of which is most respectfully submitted.

GEORGE D. COLLINS,

Counsel for the Appellant and for the Plaintiff in Error.

Dated at San Francisco, November, A. D. 1908.

MAR 20 1906
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States

GEORGE D. COLLINS,
Appellant,
vs.
THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, THE PEOPLE OF THE STATE OF CALIFORNIA, AND THE STATE OF CALIFORNIA,
Appellees.

No. 320.
October Term, A. D. 1905.

AN APPEAL FROM DECISION OF UNITED STATES CIRCUIT COURT DECLINING TO ISSUE WRIT OF HABEAS CORPUS.

Brief and Argument on Behalf of Appellees

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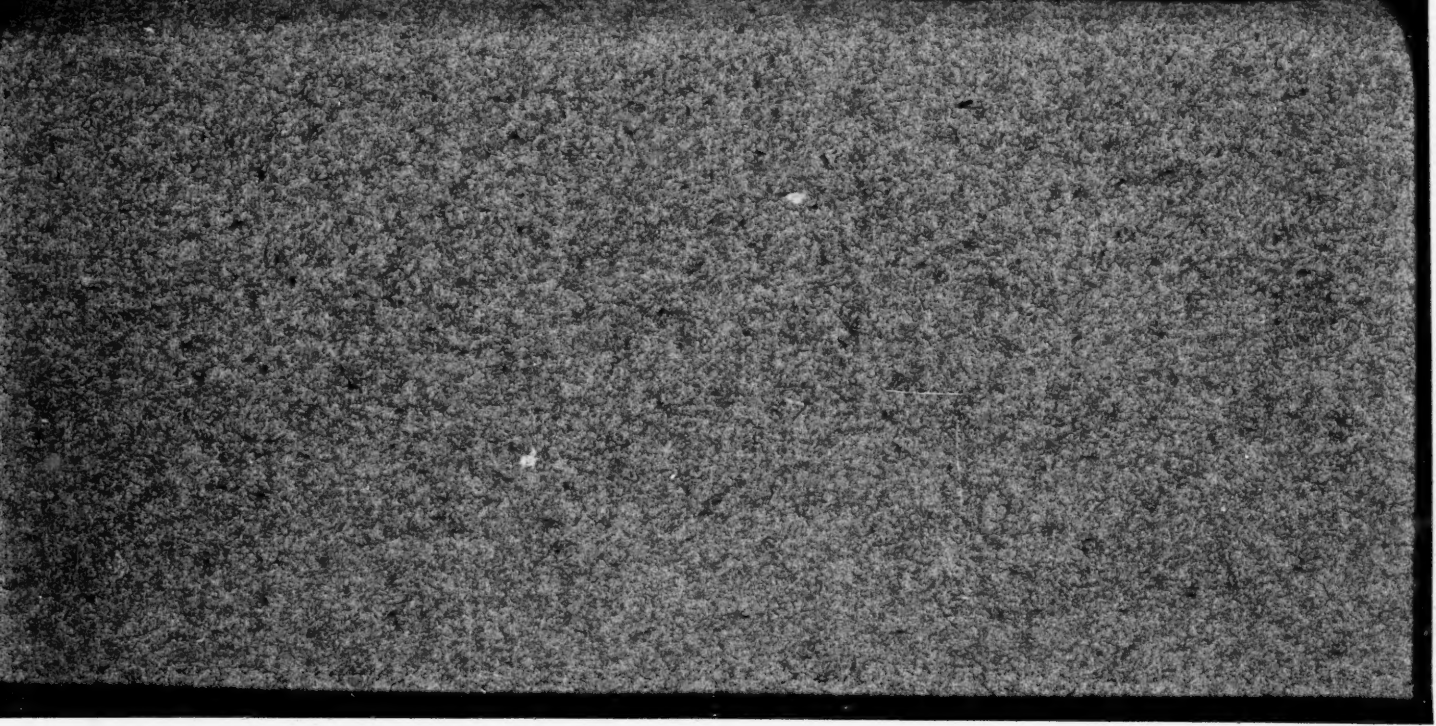
The Superior Press, 120 McAllister St., S. F.



IN THE

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GEORGE D. COLLINS, *Appellant,*

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AN APPEAL FROM DECISION OF UNITED STATES CIRCUIT COURT DECLINING TO ISSUE A WRIT OF HABEAS CORPUS.

Brief and Argument on Behalf of Appellees

STATEMENT OF CASE.

In October, 1905, the appellant was a fugitive from justice from the State of California, and was arrested as such in the City of Victoria, Province of British Columbia. He was then, on proper demand, extradited for perjury by the Canadian authorities to the United States, and brought to San Francisco, and placed in the custody of the Sheriff of that City to await trial upon the indictment upon which he had been extradited, but was

then released on bail, by the trial Court, pending his trial. This indictment alleged perjury to have been committed by him on June 30th, 1905.

After such removal, and release on bail, the appellant was put on trial in the Superior Court of San Francisco, in November, 1905, upon that indictment for perjury; but the jury disagreed on December 23d, 1905, and the cause was then continued to be set for trial at a later date.

Before another trial was had in that cause, the Grand Jury of San Francisco, on December 29th, 1905, returned another indictment against the appellant, charging him with perjury committed by him while testifying on December 12th,, 1905, on his own behalf, on the trial of the first mentioned indictment.

He was placed upon trial on this last indictment in February, 1906, and was found guilty as charged. On March 10th, 1906, he was sentenced therefor to fourteen years imprisonment in the State Prison. He perfected an appeal from this judgment to the District Court of Appeal of California; that Court affirmed the judgment of the lower court in June, 1907. Appellant applied for a rehearing of that appeal to the Supreme Court of California, but that Court refused a rehearing and affirmed the judgment.

People v. *Collins,* 6 Cal. App. Rep. 492; 92 Pac. Rep. 513.

Appellant also, in August, 1906, applied to the State Superior Court to be discharged on *habeas corpus*, upon the same grounds urged here, but his petition was denied. The judge of that court, however, allowed him a writ of error to the United States Supreme Court, and thereafter he applied to the United States District Court for a writ of *habeas corpus* in connection with such writ of error, but that Court denied his application.

Ex parte Collins, 151 Fed. Rep. 358.

This Court under the provisions of rule 9, in October, 1906, ordered that cause docketed and dismissed.

Collins v. *O'Neil, etc.*, 203 U. S. 599.

Appellant also applied to the State Supreme Court to be discharged from custody upon the same grounds urged here, but that Court also denied his petition.

Ex parte Collins, 151 Cal. 340.

The Chief Justice of that Court allowed a writ of error from this Court to review that judgment. (Rec., fol. 14, p. 8.) Under an order of this Court, made in January, 1909, that proceeding is to be heard with this present appeal.

In October, 1906, appellant also applied to the United States Circuit Court for his discharge on

habeas corpus, upon the same grounds urged in this appeal, but his application was denied.

Ex parte Collins, 149 Fed. Rep. 573.

Again in July, 1907, appellant applied to the United States Circuit Court for his discharge on *habeas corpus*, upon the same grounds urged in this appeal, but that application was denied.

Ex parte Collins, 154 Fed. Rep. 980. (Rec., fol. 14, p. 8.)

And finally in December, 1907, he made a similar application to the United States Circuit Court for the Northern District of California (Rec., fols. 1 to 10, pp. 1 to 6), and the judge therein presiding, made an order for the Sheriff and District Attorney to show cause why the writ of *habeas corpus* prayed for should not be granted. (Rec., fol. 32, p. 18.) Those respondents made return (Rec., fols. 11 to 32, pp. 6 to 17), and in that return, and in the evidence taken upon the hearing, it was shown that the original records, in the cause in which appellant had been extradited, were destroyed in the San Francisco earthquake and fire of April 18th, 1906, and that it was impossible to restore a new record thereof immediately, and they were not, owing to appellant's many objections, actually restored until August, 1907, and that it was impossible to have a further or second trial of that cause until such records were restored; and

that since the restoration of said records the appellant has had an opportunity to have a date fixed for a further or second trial of said cause, but has refused to select such date, although requested so to do. (Rec., fols. 12 and 13, p. 7, and fol. 39, p. 21.)

After hearing on that order to show cause that Circuit Judge denied the application for a writ of *habeas corpus*. (Rec., fols. 34 and 35, pp. 18 and 19.) From such order denying the application, on January 9th, 1908, the Circuit Judge allowed this appeal to this Court. (Rec., fol. 41, p. 22.)

QUESTIONS OF LAW.

First: Should a federal court interfere with a state court, when it affirmatively appears that the federal questions presented are to be reviewed upon a writ of error in the United States Supreme Court from the decision of the State Supreme Court?

Second: (But really not proper for consideration upon this appeal.) Can a person extradited from Canada for perjury under the provisions of a treaty between Great Britain and the United States, be placed on trial, and be tried, convicted and sentenced upon another charge of perjury, committed *subsequent to such extradition*, until there has been a conviction or acquittal upon the charge upon which the extradition was granted?

FIRST QUESTION OF LAW.

It affirmatively appears from this record, without contradiction, (Rec., fol. 14, p. 8) that appellant in May, 1907, applied to the Supreme Court of California for a writ of *habeas corpus,* involving all the extradition matters contained in the present proceeding, and that court ordered a writ to issue; that after hearing testimony, and full argument, upon that writ, on May 21st, 1907, said Court made its order denying the petition and remanded appellant to the custody of the Sheriff of San Francisco. That in said cause, and after such remand, appellant filed in said Court on May 27th, 1907, his petition for a writ of error from the United States Supreme Court to have such proceedings and order of remand reviewed.

On June 12th, 1907, the Chief Justice of the State Supreme Court allowed appellant the writ of error asked for by him for the purpose of having the United States Supreme Court pass upon the same extradition questions presented by him to the United States Circuit Court, as shown in this appeal.

This Court in January, 1909 (the appellees consenting thereto), ordered that writ of error, and this appeal to be advanced and heard together.

There is no doubt that a federal court has the power to grant a writ of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty. (Secs. 751 and 752, U. S. Rev. Stats.)

This power, however, is subject to any limita-

tions prescribed by the Constitution of the United States and by Acts of Congress. There is no constitutional limitation involved here. However, there is a federal legislative enactment presented, and also adjudications by the federal courts, of the questions here presented.

The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody * * * "in violation of the constitution or a law or treaty of the United States. (Sec. 753, U. S. Rev. Stats.)

It follows, therefore, that the United States Circuit Judge had the *discretionary* power to issue the writ, if the application of appellant for the writ uncontradicted by the return showed that his custody was in violation of the constitution, a law, or a treaty of the United States, and that there was urgency for a federal interference with a custody by virtue of a process of the State, AND FURTHER PROVIDED THAT APPELLANT HAD BEEN DEPRIVED OF HIS RIGHT TO HAVE THE ADVERSE DETERMINATION, OF SUCH ALLEGED VIOLATIONS OF HIS SAID RIGHTS, REVIEWED BY WRIT OF ERROR FROM THE UNITED STATES SUPREME COURT TO THE SUPREME COURT OF THE STATE.

The power thus granted a federal judge is not mandatory, but it is absolutely discretionary, and an appellate court will not reverse the order of an

inferior court unless there appears to have been an abuse of such discretion, *and* that the party claiming to be aggrieved has no other remedy.

Ordinarily a federal court will not so interfere until every remedy afforded by the laws of the state has been exhausted; and even then it has the *discretion* to leave the party to his remedy by writ of error.

Ex parte Collins, 149 Fed. Rep. 573;
Ex parte Collins, 154 Fed. Rep. 980;
Minnesota v. *Brundage*, 180 U. S. 89;
Markinson v. *Boucher*, 175 U. S. 184;
Tinsley v. *Anderson*, 171 U. S. 101;
Baker v. *Grice*, 169 U. S. 284;
Whitten v. *Tomlinson*, 160 U. S. 231;
New York v. *Eno*, 155 U. S. 89;
U. S. v. *Rauscher*, 119 U. S. 407;
Ex parte Royall, 117 U. S. 241;
Robb v. *Connolly*, 111 U. S. 624;
In re Frederick, 149 U. S. 77;

In *Whitten* v. *Tomlinson*, 160 U. S. at pages 240, 242, it is said:

> "The power thus granted to the courts and judges of the United States clearly extends to prisoners held in custody, under the authority of a state, in violation of the Constitution, laws, or treaties of the United States. But in the exercise of this power the courts of the United States are not bound to discharge by writ of *habeas corpus* every such prisoner. The principles which should govern their action in this matter were stated, upon great con-

sideration, in the leading case of *Ex parte Royall,* 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, and were repeated in one of the most recent cases upon the subject, as follows: 'We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require', does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.' 'Where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion, whether it will discharge him, upon *habeas corpus,* in advance of his trial in the court in which he is

indicted; that discretion, however, to be subordinate to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States.' (*Ex parte Royall*, 117 U. S. 241, 251-253, 6 Sup. Ct. 734, 29 L. Ed. 868; *New York* v. *Eno*, 155 U. S. 89, 93-95, 15 Sup. Ct. 30, 39 L. Ed. 80.)

"In *Ex parte Royall* and in *New York* v. *Eno* it was recognized that in cases of urgency, such as those of prisoners in custody, by authority of a state, for an act done or omitted to be done in pursuance of a law of the United States, or of an order or process of a court of the United States, or otherwise involving the authority and operations of the general government, or its relations to foreign nations, the courts of the United States should interpose by writ of *habeas corpus*. Such an exceptional case was *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 548, 34 L. Ed. 55, in which a deputy marshal of the United States charged under the Constitution and laws of the United States with the duty of guarding and protecting a judge of a court of the United States, and of doing whatever might be necessary for

that purpose, even to the taking of human life, was discharged on *habeas corpus* from custody under commitment by a magistrate of a state on a charge of homicide committed in the performance of that duty. Such was *In re Loney*, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949, in which a person arrested by order of a magistrate of a state, for perjury in testimony given in the case of a contested Congressional election, was discharged on *habeas corpus*, because a charge of such perjury was within the exclusive cognizance of the courts of the United States, and to permit it to be prosecuted in the state courts would greatly impede and embarrass the administration of justice in a national tribunal. Such again was *Wildenhaus' Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565, in which the question was decided on *habeas corpus* whether an arrest, under authority of a state, of one of the crew of a foreign merchant vessel, charged with the commission of a crime on board of her while in a port within the state, was contrary to the provisions of a treaty between the United States and the country to which the vessel belonged. But, except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by *habeas corpus* in advance of a final determination of his case in the courts of the state; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court."

In *Minnesota* v. *Brundage*, 180 U. S. pages 503-504, it is said:

> "The present case does not come within any of the exceptions to the general rule announced in the cases above cited. It is not, in any legal view, one of urgency. The accused does not, in his application, state any reason why he should not be required to bring the question involved in the prosecution against him before a higher court of the state and invoke its power to discharge him if in its judgment he is restrained of his liberty in violation of the Constitution of the United States. It cannot be assumed that the state court will hesitate to enforce any rights secured to him by that instrument, for upon them equally with the courts of the Union rests the duty to maintain the supreme law of the land. *Robb* v. *Connolly*, 111 U. S. 624, 637, 4 Sup. Ct. 544, 28 L. Ed. 542. If the state court declined to recognize the federal right specially claimed by the accused, the case could be brought here for review. After observing that the questions of constitutional law arising in this case has been determined in *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, and *Collins* v. *New Hampshire*, 171 U. S. 30, 18 Sup. Ct. 768, 43 L. Ed. 60, adversely to the present contention of the state, and that there was jurisdiction to discharge the petitioner on *habeas corpus*, the Circuit Court said: 'Even then, for reasons of comity, such power will

seldom be exercised by the Circuit Court to discharge a petitioner held under process from a state court, even after conviction by the trial court, unless large interests affecting the business of many or the rights of the public are so involved that serious consequences will follow from the delay which will be caused by the prosecution of a writ of error to a final decision, or unless the question has already been decided by the Supreme Court of the United States, whose decision the state court has disregarded in the proceeding."

In *Tinsley* v. *Anderson,* 171 U. S. at page 104, Mr. Chief Justice Fuller says:

"The dismissal by the Circuit Court of the United States of its own writ of *habeas corpus* was in accordance with the rule, repeatedly laid down by this court, that the Circuit Courts of the United States, while they have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a state in violation of the Constitution, a law, or a treaty of the United States, yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of the state, and, even after such final determination, will leave him to his remedy to review it by writ of error from this court."

In *In re Frederick,* 149 U. S. at page 78, it is said:

> "In the present case we agree with the court below that the petitioner had open to him the remedy by writ of error from this Court for the correction of whatever injury may have been done to him by the action of the state courts, and that he should have been put to that remedy, rather than given the remedy by writ of *habeas corpus*. The Circuit Court had authority to exercise its discretion in the premises, and we do not see that there was any improper exercise of that discretion, under the facts and circumstances."

In *U. S.* v. *Rauscher*, 119 U. S. at page 436, it is said:

> "If the state court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the federal government, which has been fully recognized. This remedy is by a writ of error from the Supreme Court of the United States to the State Court which may have committed such an error."

It is affirmatively alleged in appellant's petition for a writ of *habeas corpus* to the United States Circuit Court (Rec., fols. 6 and 7, p. 4):

> "That your petitioner at the very inception of said proceedings and prosecution in the matter of said second indictment and at every stage of said second prosecution, appeared before said Superior Court and proved the pendency therein of said extradition case awaiting said trial of said extradition charge to a

final conclusion, and on that ground objected each time and on each occasion to said Superior Court proceeding in said second case and on said second indictment and before said Superior Court applied and moved for the postponement of all prosecution and of the trial and of all proceedings on said second indictment until after the trial to a final conclusion of said extradition case; and in and before said Superior Court specified in all of his said objections that any prosecution of or proceedings in the matter of said second indictment while the said extradition case was pending and awaiting trial to a final conclusion in said Superior Court, were in contravention and violation of said extradition proceedings and of said extradition warrant and of the Treaty of Extradition between the United States and Great Britain and of international law and of said extradition and of the provisions of section 5275 of the Revised Statutes of the United States and deprived him of his liberty without due process of law, in violation of the first section of the Fourteenth Amendment of the Constitution of the United States. That each and all of said objections and said motion were overruled and disallowed by said Superior Court and to each of said rulings your petitioner duly and regularly took and reserved his exception. That said sheriff does not hold or detain your petitioner in his custody by any other warrant, process or authority than said judgment and said warrant of extradition."

And yet appellant made no effort to have any of such matters incorporated in any bill of exceptions, in order to have such federal or treaty questions reviewed upon his appeal to the California District Court of Appeal, and therefore, those questions were not presented to that tribunal for decision. (*People* v. *Collins,* 6 Cal. App. Rep. 492; also 92 Pac. Rep. 513; *Ex parte Collins,* 154 Fed. Rep. at page 988.)

Had he thus presented such contentions, and the decision been adverse, he could then have presented them again by petition to the State Supreme Court for a rehearing, after decision by the Court of Appeal; and then if such rehearing was denied by the State Supreme Court, he could have obtained a writ of error from the United States Supreme Court to the State Supreme Court, and such record might have contained the evidence taken in the trial court showing the reasons for the postponement on the second trial of the indictment upon which extradition was granted, and why the trial on the indictment for the perjury committed subsequent to the extradition was then proceeded with.

It therefore is shown that this case does not come within any of the exceptions or urgent or extraordinary conditions which would have warranted any interference by the Circuit Court. Appellant has his remedy by writ of error from this Court to the State Supreme Court, which, under the or-

der of this Court, is to be presented herewith for determination.

SECOND QUESTION OF LAW.

There have been no provisions of the Constitution, or of law, or of treaty violated by State Court in putting appellant on trial for the perjury committed by him *subsequent to his extradition,* and before a final disposition of the indictment upon which he was extradited.

The Warrant of Extradition for Appellant as found in the record (Rec., fols. 28 and 29, p. 16) reads as follows:

"Exhibit 1.

Warrant Under the Extradition Act to the Sheriff of the County of Victoria, B. C. the Keeper of the Common Goal at the City of Victory, B. C., and to Thomas B. Gibson, re George D. Collins, Dated 16th October, 1905, Recorded 16th October, 1905, Joseph Pope, Registrar General of Canada.

(Official Seal.)

Canada.

To the Sheriff of the county of Victoria and the Province of British Columbia, to the Keeper of the Common Goal, at the City of Victoria in the said County, and Thomas B. Gibson:

Whereas George D. Collins, accused of the crime of Perjury committed within the jurisdiction of the United States of America, was

delivered into the custody of you, the said keeper of the Common Goal at Victoria, aforesaid, by warrant of his Honor, Peter Secord Lampman, a Judge under the "Extradition Act", dated the nineteenth day of August, in the year of our Lord, one thousand nine hundred and five, pursuant to the said "The Extradition Act there to await the surrender to the said United States of America.

Now, I do hereby, in pursuance of the said Act, order you, the said Sheriff, and you, the said Keeper of the common Goal, to deliver the said George D. Collins into the custody of the said Thomas B. Gibson, and I command you, the said Thomas B. Gibson to receive the said George D. Collins into your custody, and to convey him within the jurisdiction of the said United States of America, and there place him in the custody of any person or persons appointed by the said United States of America to receive him.

For which this shall be your warrant.

Given under the hand and seal of the undersigned Minister of Justice of Canada, this sixteenth day of October, in the year of our Lord, one thousand nine hundred and five.

C. FITZPATRICK,
Minister of Justice.

Endorsed: Under the "Extradition Act" to the Sheriff of the County of Victoria, B. C., the Keeper of the Common Goal at the City of Victoria, B. C., and to Thomas B. Gibson re George D. Collins, dated 16th October, 1905, Department of the Secretary of State

of Canada, Registrar's Branch, Ottawa, 2nd January, 1907. I hereby certify the within to be a true and faithful copy of the record of the Original Warrant as entered in Lib. 172, fol. 340. J. Pope, Deputy Registrar General of Canada. (Endorsed:) Received Jan. 30 1907. Copy of Extradition Warrant. George D. Collins Received from Clerk Supreme Court."

The "Extradition Act" therein referred to is a Canadian Statute, and can be found in volume 1, Moore on Extradition, page 682, and chapter 142 of the Revised Statutes of Canada.

Section 23 of this Statute (vol. 1, Moore on Extradition, p. 689) reads as follows:

> "Whenever any person accused or convicted of an extradition crime is surrendered by a foreign state, in pursuance of any extradition arrangement, such person shall not, until after he has been restored or has had an opportunity of returning to the foreign state within the meaning of the arrangement, be subject, in contravention of any of the terms of the arrangement, to any prosecution or punishment in Canada for any other offence *committed prior to his surrender,* for which he should not, under the arrangement, be prosecuted."

Thus we ascertain the legislative intent of the Canadian Government in connection with any agreement or treaty made by Great Britain for extradition; that is, that a clear distinction is made

between offenses committed *prior* or *subsequent* to surrender. In other words if appellant had been extradited from the United States to Canada for perjury, under the provisions of their statutes he could and would have been tried, for any subsequent infraction of their laws, irrespective of any immunity under the provisions of the extradition for *prior offenses.*

The warrant issued under the procedure prescribed by this extradition act, and when the agent Gibson reached San Francisco he delivered the appellant into the custody of the Sheriff, who, under our laws, is the person appointed by the United States to receive him. He was to be held in custody for a breach of the laws of California; had he been extradited for the breach of a federal statute, the agent Gibson would have delivered him into the custody of the United States Marshal for the proper district, as being the person appointed by the United States to receive him. In neither case would it require (as contended by appellant, Rec., fol. 37, p. 20) a written order by the President or Secretary of State appointing the Marshal or Sheriff to receive the extradited prisoner.

This procedure for extradition has for its foundation the treaty between Great Britain and the United States. We have no treaty with Canada, and this Court is not at all concerned with any failure by the Canadian authorities to pursue any

of the provisions of the Canadian Extradition Act. The extent of jurisdiction invested in our courts is an examination of the execution of the laws of the country in relation to appellant since his delivery to the Sheriff under the Extradition Warrant.

If the Courts of California have not exceeded their jurisdiction in treating with appellant since such delivery, then there has been no violation of the Constitution, law or treaty as contemplated by the provisions of section 753, U. S. Revised Statutes.

The first treaty to be considered is the Ashburton Treaty of 1842, and in connection therewith the Supplemental Treaty of 1889. The provisions of section 5275 of the U. S. Revised Statutes are enactments in furtherance of the provisions of the treaty of 1842. That section reads as follows:

> "Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have the power to take all necessary measures for the transportation and safe keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offences specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of

such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe keeping and protection of the accused."

This statute was clearly an enactment in furtherance of the treaty to insure a safe transportation, and against *lawless violence,* and to vest an authority in the President, which otherwise he would not possess, to use military force, if necessary, to prevent mob violence.

This act does not in any way attempt to contravene the provisions of the treaty, and if it did, it would not be operative. It nowhere prohibits the arrest and prosecution of an extradited person, for an infraction of the state or federal laws by him *subsequent* to his extradition.

If it does then it cannot prevail against the terms of the Supplementary Treaty, if that document, either expressly, or by implication, fails to invest an extradited person with immunity from arrest and punishment for a *subsequent* offense.

This treaty is the supreme law and its provisions are of controlling force.

Section 2, article VI, U. S. Constitution:

"A treaty constitutionally concluded and ratified is, subject to the provisions of the federal constitution, the Supreme law of the land, abrogating all *prior* inconsistent laws,

whether national or state, and over-riding confiicting provisions in the constitutions of the State."

1 Moore on Extradition, sec. 82, and cases cited.

The treaty of 1842 made no reference to any other offense than the one for which extradition was asked for, and granted; but the Extradition Act of Great Britain of 1870-33-34. Vict. C. 52, passed in furtherance of the treaty, does consider the matter, and reads as follows:

"**RESTRICTIONS ON SURRENDER OF CRIMINALS.** The following restrictions shall be observed with respect to the surrender of fugitive criminals:—

(2) A fugitive criminal shall not be surrendered to a foreign state, unless provision is made by the law of that state or by an arrangement that the fugitive criminal shall not, until he has been restored or had an opportunity returning to her Majestie's Dominions, be detained or tried in that foreign state for any *offense committed prior* to his surrender other than the extradition crime proved by the facts on which the surrender is grounded."

Of course if a surrender is made without a procurement of such assurances it may be unfortunate for the criminal, but out courts are not concerned with any defects or omissions prior to the surrender. However this Act of Parliament shows

an intent to deal only with other *prior offenses,* and no attempt is made to restrict the treatment of the prisoner as to any *offense committed subsequent* to the surrender.

Then, bearing in mind this intent of the authorities of Great Britain, we must apply that intent in construing and interpreting the provisions of the Supplemental Treaty of 1889, if they are consonant therewith. Article III of this Supplemental Treaty reads as follows:

> "No person surrendered by, or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed **prior to his extradition,** other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the Country from which he was surrendered."

There could not be a better example of the application of the legal maxim "Expressio unius exclusio est alterius."

> *U. S.* v. *Watts,* 8 Sawyer, 370;
> 1 Moore on Extradition, sec. 161.

In making this treaty contract, the parties clearly had in mind that its limitations should apply only to the *present* and *past* offenses, and there was no intent, either express or implied, to guarantee any immunity, or to impress any limitations, as to *future offenses.* Immunity was

granted as to those expressed; no idea was considered as to requiring any new extradition for any *subsequent* offense. If the extradited criminal while awaiting trial committed any other offense, then he instantly forfeited his right to any protection for the *subsequent* offense, and he could be placed on trial, convicted and sentenced in entire disregard of any treaty provision.

Spear on Extradition, p. 84;
In re Collins, 151 Cal. 340;
Ex parte Collins, 154 Fed. Rep. 984.

In the case of *U. S.* v. *Rauscher,* 119 U. S. 407, page 424, in construing the provisions of the Treaty of 1848, and section 5275, U. S. Revised Statutes, in relation to another offense included in the offense for which the party had been extradited, the Court says:

> "That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed *previous to his extradition.*"

In the Collins case (now here on writ of error), (151 Cal. at p. 348), the Court says:

> "In 1889 the United States of America and Great Britain concluded an extradition con-

vention which, after referring to the treaty of 1842, made certain further provisions. Article III of the treaty of 1889 (26 Stats. 1509) reads as follows: 'No person surrendered by or to either of the high contracting parties shall be triable or tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.' By this provision the contracting governments reduced to an express and definite agreement the exemption which had been before implied. It seems clear that in limiting the exemption to crimes committed prior to extradition, the contracting parties indicated their intent that persons surrendered should not be exempt from prosecution for crimes subsequently committed. If under the former treaty there was any exemption for such subsequent crimes (which, as we have said, was not in our opinion the case) such exemption was removed by the new treaty."

Also in commenting on that case in *Ex parte Collins,* 154 Fed. Rep. at page 984, Judge Van Fleet says:

"In response to these contentions, the district attorney has contented himself with calling the court's attention to the decision of the Supreme Court of California referred to in the return. An examination of that case shows

that that was an application for petitioner's release on *habeas corpus* upon substantially the same facts as those presented here, and that petitioner indulged very largely in the same course of reasoning before that court as has been urged by him here. The opinion is exhaustive and goes very fully into the questions presented with great thoroughness and consideration; but, without repeating the argument by which the court reached its conclusion, it is sufficient to say that its judgment was adverse to the petitioner's contention; the court, with the concurrence of all the justices, holding that the offense of which petitioner was convicted was one committed subsequently to his removal to the United States, and as such was not within the protection of the treaty of extradition with Great Britain nor the provisions of the Revised Statutes invoked by petitioner; and that it was competent for the state, under the circumstances, to proceed with the prosecution of such subsequent offense, notwithstanding the extradition charge remained undetermined in its courts. The reasoning of the court is very persuasive of the correctness of its conclusion; and, in addition to what is there said, it may be suggested that a construction of the treaty in accordance with the contention of the petitioner would leave the high contracting parties largely powerless to protect their laws against the most flagrant infractions by malefactors brought into the country of either party thereto by extradition. Since, if petitioner is, under the circumstances, pro-

tected from prosecution for the offense in question, he would be equally protected as against murder, arson, or treason, or any other in the category of crimes, however heinous; and it is obvious that the mere right to follow him to the country of asylum for further remand, with all the chances of escape, would afford very poor promise of vindication to an offended law. Such a construction, it would seem, should not be indulged upon any light consideration, nor unless compelled by the most explicit language of the treaty."

Then coming to the opinion of a publicist of high repute upon the subject we find the following language in Spear on Extradition, at page 84:

"(7). Crimes after Extradition.—The fact, moreover, that the extradited party is not by these general stipulations protected against trial for any offenses which he may commit against the receiving Government *subsequently to his extradition*, and while in its custody, or after his discharge therefrom, has no relation to the question whether he is thus protected in respect to offenses preceding his extradition, other than the one which was the ground of his surrender. The two cases are not parallel.

"As to all crimes committed against the demanding Government prior to his extradition, the surrendered fugitive had the right of asylum within the territory of the Government asked to make the delivery; and the latter withdrew from him the right only in reference

to the crime for which it surrendered him to the former, without any protection in regard to offenses which he might commit while in its custody, and after his extradition. As to such offenses, if committed, he never had an asylum within the jurisdiction of the delivering Government.

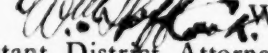
"*There is, hence, a broad distinction, in their relation to the two Governments, between crimes committed after and those committed before delivery.* Extradition implies no immunity in respect to any of the former, since it has no relation to them; but in respect to the latter it is delivery for the specific crime charged and proved, and hence, the custody secured by it can be properly used only for the trial and punishment of that crime."

Nowhere, in the text books, nor in adjudicated cases (except the three we have referred to), do we find the Court expressly dealing with a *subsequent* offense. In every case the treatment is with a *present or prior* offense, and when the words, "different offense" are used by the courts, the application of the principles declared by the use of such words, must be considered in connection with the facts of each particular case.

This phase of the case is more specially and fully treated in our brief in the other case brought here by writ of error to the State Supreme Court. However, we consider that we have treated this subject sufficiently to demonstrate, that even upon

the so-called merits of the case, as urged in this appeal, if the Circuit Judge had ordered a writ of *habeas corpus* to issue, the result, upon similar returns, and the facts as they really exist, would have been a remand of the prisoner to the custody of the Sheriff.

It is therefore respectfully submitted that the order of the Circuit Judge declining to order a writ of *habeas corpus* to issue should be affirmed, and the remittitur ordered to issue forthwith.



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